THE
MODERN LAW REVIEW

Volume 24 May 1961 No. 3

# THE NATURE AND USE OF BLOOD-GROUP EVIDENCE

ALTHOUGH it is more than fifty years since Landsteiner announced the discovery of human blood groups,[1] and although their medico-legal significance was appreciated from the very beginning,[2] blood-group evidence does not appear to have been very widely used in courts in the United Kingdom.[3] Since the problems to which the use of such evidence gives rise have not been extensively discussed in the English literature it is perhaps not inappropriate to take the opportunity presented by two recent decisions [4] to consider some of these problems here.

Fundamentally the medico-legal use of blood-group evidence rests upon two main facts.[5] First, the fact that human blood can be classified into a number of distinct groups which can be distinguished by appropriate serological techniques. Second, the fact that all the factors which define human blood groups which have so far been discovered have been shown to be genetically determined, *i.e.*, the blood group of an individual bears a definite and definable relationship to the blood groups possessed by his parents.

1 The discovery of human blood groups was first announced by Landsteiner in (1900) 27 Zbl.Bakt. 357; see also Landsteiner (1901) 14 Wien.Klin.Wschr. 1132.

2 The forensic applications of human blood groups was first recognised, as regards identification of blood stains and the like, by Landsteiner and Richter (1903) as quoted by Zinsser and Coca (1931) 20 J.Immunol. 259, and as regards their application to paternity problems by v. Dungern and Hirszfeld (1911) 8 Z.Immun.Forsch. 526.

3 In England the first use of blood-group evidence in a criminal case appears to have occurred in *R.* v. *Blakeman* (1932) 76 S.J. 138; see also *R.* v. *Kell* (1932) 76 S.J. 138, whilst the first use of such evidence in a case involving paternity appears to have occurred in 1938 (see 1 B.M.J. 1135) but see (1935) 99 J.P. & L.G.R. 61. The first use of blood-group evidence in a divorce case appears to have been in *Wilson* v. *Wilson* (1942) L.J. 129, 226; see also *Liff* v. *Liff* [1948] W.N. 128. The Irish courts appear, however, to have been ahead of the English in this matter; see (1932) 66 Irish L.T. & S.J. 111.

4 *Whitehall* v. *Whitehall*, 1958 S.C. 252 (earlier proceedings reported at 1957 S.C. 30, did not involve the issue of blood-group evidence) and *Imre* v. *Mitchell*, 1958 S.L.T. 57 and 1959 S.L.T. 13.

5 For a general account of human blood groups see Race and Sanger, *Blood Groups in Man* (3rd ed., 1958) and Boorman and Dodd, *Blood Group Serology* (1957).

These two facts define the two main classes of cases in which blood-group evidence can be used. First, there are those cases in which the problem concerns the relationship between a given sample of blood and a possible source thereof. The best example of this type of case is the grouping of bloodstains in criminal trials. The point which requires emphasis is that these cases do not involve questions of the inheritance of blood groups; they merely involve the problem of determining the blood-group of the stain and of the alleged source to see whether they are the same or not.

The second type of case in which blood-group evidence may be used is that in which the problem is to determine the relationship between persons—the inheritance of blood groups being used as the criterion. The best example of this type of case is the paternity suit, although other instances, which usually attract more public interest, are those in which the allegation of the interchange of babies at maternity hospitals is made, or in which babies have been stolen. In the latter case the judgment of Solomon is rendered by a serologist applying a biological rather than a psychological criterion.

Before we can consider the specifically legal problems raised by the use of blood-group evidence there are two general questions which need discussion. The first of these relates to the question of the reliability of blood-group evidence, for this is a matter which affects the problem of the admissibility and weight of such evidence. That there are factors which reduce the reliability of blood-group evidence below the level of 100 per cent. certainty is obvious. It is not possible here to discuss all the many and rather complex factors which influence the reliability of blood-group evidence: it must suffice for us to state, rather categorically, the authoritative assessments of reliability which have been made. The Inter-Scandinavian Meeting on Genetics and Legal Medicine assessed the accuracy of determinations within the ABO system at 99·99 per cent. (*i.e.*, a risk of error of 1 in 10,000) and within the MN system at 99·9 per cent. (*i.e.*, a risk of error of 1 in 1,000).[6] More recently, however, Lord Wheatley in *Imre* v. *Mitchell* [7] accepted, without comment, evidence to the effect that the chance error within the MN system was as low as 1 in 100,000.

In discussing the figures of the Inter-Scandinavian Meeting on Genetics and Legal Medicine, Professor Ross [8] has attempted to draw a distinction between what he refers to as " biological certainty " and " legal certainty." With respect it is submitted that his analysis of the problem rests upon a misapprehension of the nature of the genetic laws involved. Professor Ross distinguishes between *prospective* and *retrospective* laws of inheritance. Prospective

[6] Cited by Ross—see note 8, *infra*.
[7] 1958 S.L.T. 57 and 1959 S.L.T. 13.
[8] " The Value of Blood Tests as Evidence in Paternity Cases," 71 Harv. L.R. 466 (1958).

laws he defines as those which "presuppose that the qualities which the parents possess are known, and on this basis declare what qualities progeny will have," [9] whilst retrospective rules he defines as those which "declare retrospectively, with reference to the rules of inheritance and other factors, who (probably) could possibly be the father of the child." [10] Having drawn this distinction he emphasises that, as he sees it, it is the retrospective laws which are relevant so far as the application of blood-group evidence in paternity cases is concerned.[11]

Whilst this distinction is perfectly valid in some contexts we would submit that Professor Ross is in error in drawing such a distinction for the purposes of assessing the accuracy of blood-group evidence in paternity suits. The genetic laws which are relevant in such cases are neither prospective nor retrospective laws, as he defines them, but are exclusionary rules; rules which, given the blood groups of the mother and child, state which groups could not be possessed by the father of that child.

The point which requires emphasis is that blood-grouping evidence can only normally be used to exclude, not to prove, paternity. This distinction is easily established. Consider the case of a group A child born to a group O mother. By the laws of Mendelian genetics, as applied to blood groups, it can be stated that the father of that child must be either group A or group AB, but could not be group B or group O. The mere fact that the alleged father is of group AB, for example, does not, however, prove that he is in fact the father; it merely establishes that he could be the father—but so could any other man of group AB (or of group A). On the other hand, if the alleged father turns out to be of group B then it may be asserted that he could not be the father of that child. So far as the evidential value of blood tests is concerned it is the certainty of these exclusionary rules which is the relevant consideration. What then is the certainty of these exclusionary rules? If we accept the figure given by the Inter-Scandinavian Meeting on Genetics and Legal Medicine, we see that it is, for the ABO system, 99·99 per cent. This simply means, if we consider the case of a union between a group O woman and a group AB man, that the rule that their children cannot be of group AB or O and must be either group A or B has a certainty of 99·99 per cent. This is a statement of the exclusionary rule in a prospective form, *i.e.*, given the blood groups of the parents it makes a statement about the blood groups of the children. The same rule, however, may be stated in a retrospective form. Thus given a group A child and a group O mother the rule that the father of that child cannot be of group O or B and must be either

[9] At p. 469. At p. 470 he refers to these laws as "purely biological."
[10] At p. 470. On the same page he refers to these laws as "population laws."
[11] At p. 470.

group A or AB still has a certainty of 99·99 per cent. for it is the same rule and therefore subject to the same risk of error.

We may compare the above with the situation arising on the application of the rules of inheritance as defined by Professor Ross. Given the blood groups of the parents as O and AB then their chance of having a group A child is 50 per cent. (as is their chance of having a group B child) so that the prospective law which states that parents of groups AB and O will have a group A child has 50 per cent. validity.

If, however, we consider the retrospective situation, given a mother of group O and a child of group A then the probability of the father being of group AB will depend upon two factors:

(1) the number of other blood groups that the father of that child could biologically possess; and

(2) the frequency of distribution of the relevant groups. The father of a group A child born of a group O mother could be either group AB or group A (but could not be group O or B). If therefore we assume, as reasonable approximations, that the frequency of distribution of group A is 45 per cent. and that of group AB 5 per cent.[12] then the possibility that the father is of group AB will be approximately 10 per cent.

Thus although Professor Ross's distinction between prospective and retrospective laws is a perfectly valid distinction it is not one which is relevant to an assessment of the reliability of blood-group evidence in paternity suits since the inheritance rules involved in such cases are not concerned with establishing who could be the father but who could not be the father of any given child.

Although the distinction between the positive and negative aspect of blood-group evidence must be constantly borne in mind it is nevertheless submitted that it is possible to place undue emphasis upon it. Even in the case where blood-group evidence shows an exclusion of paternity the evidence cannot, as we have seen, be considered 100 per cent. reliable. On the other hand there are circumstances in which blood-group evidence may be taken as virtual positive proof of paternity. This occurs in those cases in which both the child and the putative father possess some very rare antigen.[13]

One final point remains to be considered before we turn to discuss the specifically legal problems that arise out of the use of

[12] For the frequency distribution figures see Mourant, *The Distribution of the Human Blood Groups* (1954) and Mourant, Kopec and Domanoewska-Sobczak, *The ABO Blood Groups* (1958).

[13] Thus Race and Sanger, *op. cit.*, at p. 292, point out that: "On rare occasions paternity could be proved beyond all reasonable doubt. If, for example, the accused man and the child were both B, N.S, $C^wD^ue$/ cde, Lu (a+), K+, and the mother were of common groups, paternity would be proved, provided the brothers of the accused had alibis. Outside the family of the accused there would not be such another man in ten million."

blood-group evidence, and that is to emphasise that in considering the evidential value of blood-group evidence it is not the absolute but the relative reliability of such evidence that is relevant. The question is not how far does the reliability of this evidence fall short of 100 per cent. certainty, but rather how much more reliable is it than evidence derived from a traditional source. To reject blood-group evidence simply on the ground that it falls short of 100 per cent. certainty and then to fall back on the traditional method of weighing oral testimony is to assume that the method of weighing oral testimony is more accurate, and this implies that the margin of error involved in this method is less than 1 in 10,000. One is surely justified in thinking that this represents a rather optimistic view of the reliability of a court when weighing oral testimony.

It is against this background that we must turn to consider the position of blood-group evidence in court. Such evidence gives rise to two main problems. The first concerns the question of admissibility. There is no real argument regarding the admissibility of blood-group evidence which, in a paternity case, excludes the putative father, but the question which arises concerns the admissibility of such evidence when he does not show an exclusion, *i.e.*, when it indicates a possibility of paternity. There has been no discussion of this problem in the English cases and even the American cases, which are the only authorities available, reveal a conflict. In at least two cases involving paternity, *State* v. *Morris* [14] and *People* v. *Nichols*,[15] it has been held that blood-test results showing merely possible paternity were of no probative value and should have been excluded as irrelevant. On the other hand, in cases involving the identification of stains and the like we find that a rather different attitude prevails. Thus in *Williams* v. *State* [16] the accused was charged with rape. The evidence was that blood found on the coat of the accused was of the same group as that of the victim but different from that of the accused. The victim's blood was of group O and the defence objected that as 45 per cent. of the population were of this group the evidence was not probative and should be excluded. This submission the court overruled, saying:

> "Any evidence tending to identify defendant as the guilty person and to show his presence at the scene of the crime is relevant and competent."

[14] 102 N.E. 2d 450 (1951). We would stress that no attempt has been made here to set out all the relevant American authorities or even to set out in full the position in America. In citing American cases, our intention is simply to fill the gaps which exist so far as the English authorities are concerned. The American authorities, up to 1945, are collected and discussed in 163 A.L.R. 939–961 (1945).

[15] 67 N.W. 2d 230 (1954). In *State ex rel. Freeman* v. *Morris*, 102 N.E. 2d 450 (1951) a finding of possible paternity was held inadmissible on the construction of a local statute relating to blood-group evidence.

[16] 143 Fla. 826; 197 So. 562 (1940).

The evidence was therefore held admissible, " not for the purpose of identifying the bloodstain as blood from the body of the deceased but as corroborative evidence for the consideration of the jury."

In *Shanks* v. *State* the court put the position as follows [17]:

> " The objection of remoteness goes to the weight of the evidence rather than to its admissibility. To exclude evidence merely because it tends to establish a possibility rather than a probability, would produce curious results not hitherto thought of."

A similar conclusion was also reached in *Commonwealth* v. *Stratti* [18] which involved similar facts.

The problem which immediately arises is why should evidence showing a positive result be excluded in paternity cases but admitted in criminal trials. The admissibility of such evidence in criminal trials seems to follow clearly from general principle. Thus in *Hollington* v. *Hewthorn & Co., Ltd.*, Goddard L.J. (as he then was) enunciated the general principle that [19]:

> " Generally speaking all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded."

Now the definition of relevance given by Stephen was that [20]:

> " Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."

And it can hardly be denied that a non-exclusionary blood-test result tends to render paternity more probable; it is therefore relevant and should be admissible under the principle enunciated by Lord Goddard in *Hollington* v. *Hewthorn & Co., Ltd.*

In considering this question it should be remembered, as was pointed out earlier, that, in cases in which rare antigens are involved, a non-exclusionary blood-test result can amount to virtual proof of paternity. It would be absurd to exclude such evidence on the ground that it was of no probative value, but the only difference between such cases and those of the more common antigens is one of the weight of the evidence. It is a good many years since Lord Cockburn C.J., in *R.* v. *Birmingham Overseers*, stated [21]:

> " People were formerly frightened out of their wits about admitting evidence lest juries should go wrong. In modern times we admit the evidence and discuss its weight."

If that was so in 1861 it is surely not less so today, and we would submit, therefore, that on principle evidence of a non-exclusionary

[17] 163 A.L.R. 931; 45 A. 2d 85 (1945).
[18] 73 A. 2d 688 (1950).
[19] [1943] K.B. 587 at p. 594.
[20] *Digest of the Law of Evidence*, 12th ed., Art. 1.
[21] (1861) 1 B. & S. 763 at p. 767.

blood test should be admissible in evidence in paternity cases and be given such weight as is thought proper.

Another difficult question concerns the problem whether evidence of blood tests which show an exclusion should be regarded as conclusive. This problem was discussed in the recent Scottish case of *Imre* v. *Mitchell*,[22] but before considering this case it will be helpful briefly to review the American attitude on this point.

The American cases reveal a gradual change in attitude. The earlier attitude was to refuse to regard an exclusion as conclusive. This was the view taken in *Arais* v. *Kalensnikoff* [23] and *Berry* v. *Chaplin* [24] and many other cases,[25] but more recently there are signs of a change in attitude. Thus in *Schulze* v. *Schulze* [26] the court pointed out that to reject blood-group evidence in such cases would be tantamount to holding either that the testimony of the physician was unworthy of credence or that the tests themselves were futile. In *Jordan* v. *Mace* [27] the court argued that blood-group evidence was more than mere expert opinion and they held that it was not open to a court to give such weight as it thought fit to what was a biological law. They thus considered that the function of a jury in such cases was limited to determining whether the conditions existed which made the biological law applicable and whether the tests had been properly carried out. In *Ross* v. *Marx* [28] the court expressed the same view rather more tersely: " for a court to declare that these tests are not conclusive would be as unrealistic as it would be for a court to declare that the world is flat."

Their lordships in the Court of Session would, however, be quite prepared to make such an assertion if their view of the law so required it, for in *Imre* v. *Mitchell* they held that an exclusion by the MN system was insufficient to rebut the presumption of legitimacy. In this case a woman brought an action craving a declaration that her child was a bastard and not the child of her former husband whom she had married three weeks after the birth of the child. Her husband had divorced her on the ground of adultery and had been given the custody of the child, and it was in the hope of regaining custody of the child that she sought the declaration. Apart from her own allegations, however, the only evidence upon which her case rested was evidence of a blood test which excluded her former husband from paternity of the child.

[22] *Supra.*
[23] 67 P. 2d 1059 (1937).
[24] 169 P. 2d 442 (1946).
[25] See *Harding* v. *Harding*, 22 N.Y.S. 2d 810 (1940); *State ex rel. Walker* v. *Clark*, 144 Ohio 305; 58 N.E. 2d 773 (1944); *State ex rel. Slovak* v. *Holod*, 63 Ohio 16; 24 N.E. 2d 962 (1939), *Jordan* v. *Davis*; 57 A. 2d 209 (1948) and *Scalone* v. *Scalone*, 98 N.Y.S. 2d 167 (1950).
[26] 35 N.Y.S. 2d 218 (1942).
[27] 69 A. 2d 670 (1950); in *Commissioner of Welfare ex rel. Tyler* v. *Costonie*, 97 N.Y.S. 2d 804 (1950). See also *Arais* v. *Kalensnikoff*, *supra.*
[28] 90 A. 2d 545 (1952).

In the Outer House, Lord Wheatley stressed the unreliability of the tests emphasising in particular the possibility of mutation and of non-detection of a weak N2 antigen, and refused to accept the proposition that the evidence could be regarded as conclusive. On the other hand his lordship also pointed out that [29]:

> " The fact that there is 100,000 to one chance of error in a test does not rob that test of all evidential value. On the contrary, if the proposition is stated the other way, namely that the odds are 100,000 to one on the test being accurate and proving the non-paternity of Mitchell, it can be said that the high degree of probability is sufficient to discharge the *onus* of proof which the law requires for the establishment of the pursuer's case."

On this basis his lordship held that the pursuer had proved her case.

This view, however, did not commend itself to their lordships in the Inner House and they held, in the words of the Lord President, that " the interlocutor of the Lord Ordinary should be recalled and the defender Mitchell should be assoilzied from the conclusions of this action." In discussing the case the Lord President stressed the strength of the presumption of legitimacy which arises where a man, after opportunity for access, marries a woman in an advanced state of pregnancy. He further stressed the fact that the pursuer had originally acknowledged the child as being that of her former husband. His lordship thus stated [30]:

> " In the result therefore I approach the facts with two considerations in view, firstly that there is in the circumstances of this case an almost irresistible presumption of legitimacy, and secondly that the testimony of the pursuer herself can be of no avail to overcome that presumption."

After stressing the fact that the tests were not infallible on the ground that a weak antigen may be missed in testing and also that " it has recently been ascertained that the factors in a child's blood may change " he held that the blood-group evidence was insufficient to overcome the presumption of legitimacy.

His lordship made one final observation which it is worth noting here, namely [31]:

> " Had I regarded the blood tests in the present case as being of crucial importance I should have had very considerable hesitation in regarding the evidence relating to them as competently before the court, in the light of the circumstances in which the samples of blood appear to have been taken from Mitchell and from the child."

The circumstances to which his lordship referred were the facts

[29] At p. 59. The assessment of the margin of error in the case of the MN system at 1 in 100,000, which was presumably based on the expert evidence, indicates the increasing reliability of blood tests, at least in the opinion of the serologists.
[30] At p. 17.
[31] At p. 18.

that although Mitchell consented to samples being taken from himself and the child, he had no idea what it was for.

This latter point is one which will be discussed later. For the present we wish only to consider their lordships' opinion that the exclusion under the MN blood-group system could not be regarded as conclusive evidence in the case before the court.

We may best approach this question by considering the factors which affect the reliability of evidence of access, which is the usual evidence upon which a finding of paternity is based. It can easily be seen that a finding of paternity based on evidence of access depends upon two assumptions:

(1) that access implies intercourse,

(2) that the child in question was conceived as a result of such intercourse.

Whilst the first assumption may be regarded as reasonable in most cases, its reliability falls considerably short of the 100 per cent. accuracy which seems to be demanded of blood-group evidence. The second assumption, however, is not even as reasonable as the first. The first and obvious objection is that the assumption implies a proven negative, *i.e.*, that no other person had intercourse with the woman during the possible period of gestation of the child. This being a negative, cannot, of course, be proved, and in the nature of things evidence on this point is not likely to be forthcoming, yet the truth of this negative assumption is assumed every time a finding of paternity is based upon evidence of access.

It is, of course, difficult to give mathematical expression to the margin of error of such evidence but normal human experience suggests that it is a very much wider margin than that involved in blood-group evidence. It is therefore rather difficult to understand the attitude that can refuse to act on scientific evidence the margin of error of which is certainly no greater than 1 in 1,000; rejecting such evidence in favour of evidence whose margin of error is indeterminate but certainly very much wider than that of blood-group evidence. There is surely something slightly silly about a situation in which evidence of this nature can be discounted in favour of evidence that an inquisitive neighbour saw a tall dark man leaving the house in the small hours of the morning. How can a court possibly weigh the one against the other? Where there is evidence of such high intrinsic probability, a probability which is far greater than that of any other evidence which can be brought with regard to the question, it seems unreasonable to hold that it cannot be regarded as conclusive on that matter. It may be admitted that blood-group evidence is not 100 per cent. certain; what evidence is? But to reject such evidence because of its failure to reach this ideal standard, and then to act on other evidence which must be of far less probability, is surely to strain after gnats and swallow camels.

If, as was held in *Imre* v. *Mitchell*, an exclusion of paternity based on the MN system is insufficient to rebut the presumption of legitimacy, in the circumstances of that case, then the conclusion must surely be that the presumption, at least under those circumstances, is irrefutable, at least so far as the Scottish courts are concerned, for it would surely be a very bold judge who assessed his ability to weigh oral circumstantial evidence as involving a margin of error at less than 1 in 100,000.

It is on these grounds that we would submit that courts should regard blood-group evidence showing a positive exclusion of paternity as conclusive proof of the matter in hand. It must, however, be allowed that there is one feature of blood-group evidence which justifies a court in proceeding with caution in this matter. Blood-group evidence differs from most other forms of scientific evidence with which courts have to deal in that, if accepted, it disposes of the entire issue before the court. The issue before the court is simply whether a man can be held to be the father of a given child. Where blood-group evidence shows a positive exclusion then it disposes of the entire issue. The courts are doubtless justified in hesitating before abdicating their function to such an extent: hesitating, that is, until they are sure that the scientific claims are well founded. This natural caution doubtless justifies the attitude of the American courts in earlier years, but it is our submission that the time has long since passed when any reasonable doubt can be entertained regarding the reliability of such evidence, and it is surprising and disappointing to find that Scottish courts still find it necessary to regard such evidence as insufficient to rebut a presumption whose basis seems itself to be highly questionable.

We turn finally to consider the problem of the power of a court to order the taking of blood tests. The power of a court to do so was decisively rejected in the recent Scottish case of *Whitehall* v. *Whitehall* [32] in which there was a petition for divorce on the ground of adultery, the husband alleging that the child to which his wife had given birth was the offspring of an adulterous union. The husband expressed his willingness to submit to blood tests but the wife refused to agree to such a course, so the husband enrolled a motion requesting the court to order the wife and her child to allow samples of their blood to be taken. The Lord Ordinary (Lord Wheatley) refused the motion, saying [33]:

> " The obvious purpose of the proposal is to ordain the defender to make available to the pursuer evidence which might be favourable to the pursuer's case and damaging to her own. If the blood tests disclosed that the pursuer was of the blood group consistent with him being the father of the child, it would go no further than establishing a negative fact, since

[32] *Supra.*
[33] At p. 253.

> it would not preclude the possibility of another man of the same blood group being the father. On the other hand if the result of the tests was such as to exclude the pursuer as being the father of the child by grouping, it would be strongly argued that such evidence was formidable and weighty if not altogether conclusive in support of the pursuer's case. In these circumstances the defender is being called upon to provide to the pursuer the basis of evidence from which he has nothing to lose and a great deal to gain, while she has nothing to gain and a great deal to lose. A motion to ordain a party to a cause to provide to the other side the basis of evidence of such a nature is one to which I would not give effect unless I was obliged to do so by the authority of principle or precedent. It seems to me that the proposal offends against all conceptions of justice and is contrary to the fundamental principles of our law."

Regarding the authorities, his lordship dismissed the views expressed in Walton [34] and Fraser [35] regarding the power of a court to order medical inspection, on the grounds that first, their propositions related to actions for nullity, whilst in his lordship's opinion " the considerations which apply to such a type of action would not necessarily cover an action of divorce on the ground of adultery," [36] and secondly, that these opinions relied upon English authorities: " and I am not satisfied that in such cases the English procedure would necessarily commend itself to the Scottish courts." [37]

His lordship further discounted a number of decisions which had been cited to him as supporting the pursuer's case. The first of these was *A.B. or D.* v. *C.D.*[38] This was a petition for nullity on the ground of impotency, the defender at the time being insane. Lord Salvesen held that as the defender was insane, medical inspection could only be held with the permission of the asylum doctor. His lordship continued, however:

> " In England, for the law on this subject is substantially the same as our own, it seems to be the regular practice for the court to order a medical inspection of the defender and if necessary this order will be enforced; although where the defender, being sane, refuses to submit to such an inspection, such refusal may in such cases be regarded as sufficient corroboration of the pursuer's evidence."

On this opinion Lord Wheatley, after emphasising that the issue in that case was one of nullity, commented [39]:

> " Lord Salvesen, however, envisaged that the defender if sane might refuse to submit to such an inspection and expressed

[34] *Husband and Wife* (3rd ed., 1951) at p. 8.
[35] *Husband and Wife*, 2nd ed., Vol. 1, at p. 102.
[36] At p. 253.
[37] At p. 253.
[38] (1908) 15 S.L.T. 911.
[39] At p. 254.

views with regard to the evidential effect of such a refusal on which I should like to reserve my own opinion. Be that as it may, I cannot regard that case as an authority in support of the proposition now advanced in a different form of action, and even if it were, since it is not binding on me, I would not be prepared to follow it in the present case."

The second case considered by Lord Wheatley was *X.* v. *Y.*[40] which was an action of adherence and aliment in which Lord Ashmore granted an order for medical examination as to the issue of consummation. The defender, in his defence, had alleged non-consummation, whereupon the pursuer submitted herself to medical examination. The defender then moved that the court order the pursuer to submit to medical examination by his own doctor. It was this motion which was granted by Lord Ashmore. Lord Wheatley contended that this decision had probably proceeded on the basis of " fairness." He thus pointed out that, in that case, the pursuer had indicated that she was going to lead medical evidence and it was therefore only fair that the defender should have an equal opportunity of presenting medical evidence on the same point. His lordship continued [41]:

" In the present case, if the defender had obtained blood samples of herself, the child and the pursuer and had intimated to him that she intended using the results of these tests in support of her case, then the argument of fairness might well have been invoked to support a motion such as is now before the court in order to give the pursuer an opportunity of adducing counter-evidence on that issue."

In so holding his lordship cited in support the earlier decision in *Davidson* v. *Davidson* [42] in which expert evidence as to the state of a witness was rejected on the ground that she had been examined by one side only, the court being of the opinion that it had no power to order the witness to be inspected by the other side.

It may be that there are intricacies of Scottish procedure which have escaped us, for Lord Wheatley's views on the nature of medical inspection make strange reading. So far as England is concerned it would appear to be true to say that where the court orders a medical inspection it is not generally for the purpose of balancing the medical evidence which has been called by the parties. The inspection is carried out by doctors appointed by the court rather than by those of one of the parties.

His lordship's views on the nature of a court order for medical inspection led him, nevertheless, into a strange interpretation of the situation before him for he argued, as we have seen, that if the defender had obtained blood samples of all three relevant persons the principle of " fairness " might have justified the granting of an

[40] 1922 S.L.T. 158.
[41] At p. 254.
[42] (1860) 22 D. 749.

order. If, however, the defender had had such blood samples tested the result would either have excluded the paternity of the pursuer, in which case she would presumably have not led the evidence, or it would not have excluded paternity, in which case, as Lord Wheatley himself remarked, she would have been unlikely to lead it on the ground that it merely established a negative fact. In either case, therefore, the defender would have been unlikely to lead the result of the tests. Even, however, supposing that the evidence was led it is difficult to see what purpose there would be in making an order on the basis of fairness. The blood groups of all three parties would be known and all that the pursuer could do, assuming that he had obtained his order, would be to send the blood samples to another laboratory with the remote hope that they might reach a different result.

It seems reasonably clear, however, that the decision in *Whitehall* v. *Whitehall* turns upon questions of Scottish procedure which, in the opinion of Lord Wheatley, differing on this point from Lord Salvesen, does not necessarily correspond with the position in English law. It follows that the decision cannot be regarded as even possessing great persuasive authority so far as the English courts are concerned, and for the purpose of assessing the power of an English court to make an order for blood tests we must consider the position from the point of view of general principle.

So far as English law is concerned it must be emphasised that the courts have always had power to order medical inspection of the parties in certain types of cases. This is clearly exemplified in the old writ *de ventre inspiciendo* by virtue of which the courts would order the inspection of a widow who claimed to be with child in order to guard the heir against supposititious births.[43] In cases such as *Ex p. Aiscough*,[44] *Ex p. Bellet* [45] and *Re Blakemore* [46] the rigours of the earlier procedure were ameliorated but it never seems to have been doubted that the procedure was compulsory. As Wigmore has stated [47]:

> " The compulsory nature of this inspection was never doubted; and its firm place in our law is shown by the six centuries of time through which the employment of the writ persisted."

Again, it is clear that, in England at least, the court can order medical inspection in nullity cases involving impotence.[48] It was

43 This writ, it appears, was also known to Scottish law, although the point does not seem to have been brought to the attention of the court in *Whitehall* v. *Whitehall;* see *Encyclopaedia of Scots Law*, Vol. 9, at p. 291.

44 (1731) 2 P.Wms. 591.

45 (1786) 1 Cox Ch. 297.

46 (1845) 14 L.J.Ch. 336.

47 *Evidence*, Vol. VIII, § 2220, at p. 185.

48 Whether this is so in Scottish law appears to be uncertain, Walton, *op. cit.* (at p. 8) points out that *X.* v. *Y.*, *supra*, is the only reported instance in Scotland.

established in *Intract* v. *Intract* [49] that the court has a discretion in the matter, but it seems never to have been doubted that the power to so order existed and could be exercised in appropriate cases. It also seems to be clear that refusal to obey an order for such inspection may be treated by the court as sufficient corroboration of the petitioner's allegations.[50]

Cases such as the above establish the proposition that the English courts have the power, at least in some cases, to order medical inspection of the parties. It is quite true, of course, that in some cases the courts have refused to make such an order. Thus on the basis that the wording of the relevant statute did not cover such a contingency the court held, in *Re Betts*,[51] that a bankrupt could not be ordered to undergo medical examination for life insurance purposes. In *Agnew* v. *Jobson* [52] it was held that, on a charge of concealment of birth, a magistrate has no power to order medical inspection of the female. Such cases, however, merely show that, in some cases, the power to order medical examination will not be exercised; what they do not show is that the power does not exist. The question is, therefore, simply whether paternity suits are appropriate cases for the exercise of this undoubted power.

In *Whitehall* v. *Whitehall* Lord Wheatley held that, on principle and quite apart from questions of authority, such cases were not appropriate. His principal justification for taking this view appears to have been that the evidence might be efficacious [53]:

> " The making available of a sample of Elaine's [the child's] blood might not only have the effect at the end of the day of leading the court to an inference of adultery on the part of the defender, but might also establish in due course the bastardy of Elaine herself."

To exclude evidence on the ground of its relevancy seems to be a rather new principle which, whatever the position in Scottish law, seems to find no place in the law of England. One may surely comment, however, that the courts have reached an extraordinary position if evidence can really be excluded on this ground.

Lord Wheatley also stressed the point that if the court ordered the taking of blood samples the evidence thus obtained might help the pursuer but could not assist the defender. Can this really be accepted as a justification for refusing to make an order? The court will order discovery of any material document, and the criterion of materiality as laid down in *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*[54] was that:

> " Documents are material which it is not unreasonable to suppose may tend either to advance the case of the party seeking discovery or to damage the case of his adversary."

If, as thus appears, the court will order that such evidence be made

[49] [1933] P. 140.
[50] See *W.* v. *S.* [1905] P. 231.
[51] (1888) 13 App.Cas. 570.
[52] (1877) 13 Cox C.C. 625.
[53] At p. 255.
[54] (1882) 11 Q.B.D. 55.

available when in documentary form, why not when it is in some other form? If one party to an action can really refuse to make evidence available merely on the ground that it tends to support the other side, litigation will become an even more hazardous affair than it is at present. It is submitted that, whatever may be the position in the law of Scotland, there is no such general principle in English law.

In the Inner House, further arguments were adduced in support of the refusal to grant the motion ordering blood samples to be taken. The Lord Justice-Clerk thus observed [55]:

> " The pursuer's proposition has this corollary that the logical conclusion of the granting of such an order must be that the court is prepared to enforce it. Enforcement would mean the compulsory infliction of a surgical operation, a minor one no doubt, but nonetheless an invasion of the person of the wife; or, if the court were not prepared to go to that length it would have to regard her refusal as a contempt of court which would mean, if the court were really in earnest, keeping the wife in gaol till she thought better of her refusal."

Several points may be made in respect of this opinion. First, his lordship's conclusion does not follow from his premise. The effect of a refusal to undergo medical examination in nullity cases turning on questions of consummation is simply that the court may treat the refusal as sufficient evidence of the fact in issue and base a decree on the refusal. The English courts do not see the necessity for either compulsorily examining such women or incarcerating them, and there seems to be no logical reason why the Scottish courts should not be able to take the same view.

The second point which arises out of the Lord Justice-Clerk's opinion relates to his view that the operation involved would be an " invasion of the person of the wife." It is difficult to see just what such an expression means this side of rhetoric. The operation of the writ *de ventre inspiciendo* also involves an " invasion of the person of the wife " but that does not appear to have deterred the courts. Such a view appears to be similar to the rather strange opinion which was actually sustained by an American court in *Commonwealth* v. *Krutsick* [56] that to order blood samples to be taken would be to order the commission of an assault and battery. A battery is the application of force without lawful justification; what is lawfully ordered by a court can hardly be considered as illegal. The point at issue is whether courts possess the power to order such tests. If they possess the necessary power then the taking of the necessary blood samples cannot constitute a battery. Admittedly if they have not the necessary power to order such blood samples to be taken, then to order the taking of such samples would be to require the commission of a battery,

[55] At p. 258.
[56] 30 A. 2d 325 (1946); see also *Bednarik* v. *Bednarik*, 16 A. 2d 80 (1940).

as in *Agnew* v. *Jobson* [57] which was quoted above, but the possible consequences of their not possessing the necessary power can hardly be used as an argument against their possession of that power. The argument of the court in *Commonwealth* v. *Krutsick* is the same as that which would hold that a court cannot lawfully order the execution of the death penalty because to do so would be to order the commission of murder.

A second argument on which great stress was laid by their lordships in the Inner House was that since the child was not a party to the action, the court could not possibly have the power to order samples of her blood to be taken, and this point was related to the further point that there was nobody competent to consent, on behalf of the child, to such samples being taken.

The question of consent may be dealt with fairly shortly, for in so far as the court has power to order such tests then questions of consent are irrelevant. The point at issue is whether the court has that power, and with respect to this point consent by or on behalf of the child is of no significance. The point that the child is not a party to the action seems also, with respect, to be of little significance, at least so far as English law is concerned. The courts have long had the power by *subpoena duces tecum* to order a stranger to the action to produce documents in his possession, and if a stranger can be ordered to produce documents, why should he not be ordered to produce other evidence in his possession? There seems, therefore, to be nothing in principle which renders the ordering of a person who is not a party to the action to make available blood samples in any way an objectionable procedure.[58] We would respectfully submit, therefore, that there is nothing in the arguments adduced in *Whitehall* v. *Whitehall* which could be regarded as of great weight so far as an English court is concerned, and we would further submit, therefore, that if and when the problem comes before an English court the decision in *Whitehall* v. *Whitehall* should not be followed.

It may be added that the American decisions reveal a controversy on this point, but that at least some courts hold that there exists an inherent power to order such tests. In *State ex rel. Van Camp* v. *Welling* [59] the court observed:

"Ways and means for the ascertainment of truth are not

[57] *Supra.*

[58] In *Beuschel* v. *Manowitz*, 271 N.Y.S. 277; 272 N.Y.S. 165 (1934) reversal was ordered on the ground that the child was not a party to the action, but it was also held that the child's welfare was not involved to the extent that the chancery jurisdiction of the court could be invoked: in *Beach* v. *Beach*, 114 F. 2d 479 (1940) the court held that the child was a party to the action and that the results of the tests were as much for the benefit of the child as for the mother or putative father.

[59] 3 Ohio Supp. 333 (1936); see also *State* v. *Damm*, *supra*. Decisions denying such a power include *Bednarik* v. *Bednarik*, *supra*; *People ex rel. van Epps* v. *Doherty*, 24 N.Y.S. 2d 821 (1941); *Taylor* v. *Diamond*, 269 N.Y.S. 799 (1934) and *Commonwealth* v. *Morris*, 22 P.D. & C. 111 (1934).

> statical. The value of scientific research and the truth thus revealed ought to be available to the courts. If this be true, then the courts must have the power, soundly exercised, to bring the light of scientific research and knowledge to bear upon the issues of fact as a further aid in arriving at the truth and in doing complete justice. If this be unsound, then the courts in the application of the remedial law may fail to keep abreast of the march of progress, and thereby fail to command uniform confidence and respect. It is no answer to say that there is a lack of express authority unless we conceive that the law is static and lacks the merit of an expansive flexibility, both in respect to the recognition of rights and their invasion and in respect to the power of the court to discover and apply methods of ascertaining the truth whereby the remedy may be appropriate and coincide with justice."

In conclusion we may finally mention one argument against the power to order blood tests which has been canvassed in the American courts although it does not yet appear to have been raised in the United Kingdom. This argument is to the effect that to order such tests would be to infringe the rule against self-incrimination. The answer to this argument has been given by Wigmore [60] who pointed out that the privilege against self-incrimination is only applicable where oral testimony is involved. Since the supplying of blood samples for testing does not involve the testimonial responsibility of the party concerned he cannot claim the privilege in this context. This appears to be the view followed in most American jurisdictions and represents, we must submit, the correct approach to this problem.[61]

We submit in conclusion, therefore, that the English courts possess the power, if they wish to exercise it, of ordering blood tests to be taken in appropriate cases. In *Whitehall* v. *Whitehall* [62] the Lord Justice-Clerk stated that

> " The most plausible way in which the argument for the pursuer can be put is to say that, owing to a new medical technique, evidence may be made available which will assist the court in discovering the truth. It is in the interest of justice that truth should be discovered; this method is scientific and objective and it is just obscurantism on the part of a court to refuse to avail itself of it."

Despite his lordship's attempt to show that this view is not correct, nothing in the judgment which follows suggests any reason for

[60] *Op. cit.* at p. 375. Earlier (at p. 374) he had observed: " If an accused person were to refuse to be removed from the jail to the court room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim."

[61] *Davis* v. *State* (1948) 57 A. 2d. In *McFarland* v. *U.S.*, 150 F. 2d 593 (1945), the court observed: " Out of court as well as in court his body may be examined with or without his consent." *Cf.* however, *Bednarik* v. *Bednarik*, *supra*.

[62] At p. 257.

supposing that this is not in fact the true position. The comment of Wigmore on the attitude of courts who refuse to order such tests is both savage and justified: it forms an appropriate conclusion to this paper [63]:

> "How strange is this self-stultifying concession by a court of justice that it knows of no process to execute its powers for enforcing a conceded duty! Must there be a precise precedent for everything? Were the judges of Charles II or George III, who themselves were but the followers of six centuries of royal judges, the generation last vested with authority to apply old principles in new forms? Nobody has been able to find any definite authority for the *duces tecum* form of subpoena; but the judges of 1808 were not moved by such trifling; such a power, they declared . . . is 'essential to the very existence and constitution of a court of common law.' The mere phrasing of an auxiliary writ is not to stand in the way of inherent powers. Is there any known precedent of a writ to a court bailiff ordering him to shut the doors to keep out an excessive throng, or to open the windows to let in fresh air? But no judge ever refrained from such orders because he had never seen such a form. The ordinary subpoena for a witness is of no avail when he is in prison; but the judges—somebody, sometime, no one knows who or when—varied the form of words and ordered the jailer '*habeas corpus ad testificandum.*' . . . They did not supinely sit and watch justice defrauded because the usual piece of parchment did not precisely fit the exigency. The courts can as well command a witness to let the jury, or qualified experts, inspect his premises, his chattels, or his person, as to produce his documents. It is not to be supposed that our courts will finally commit themselves to the denial of such a plain dictate of principle and common sense."

G. W. Bartholomew.*

63 *Op. cit.*

* B.Sc.(Econ.), LL.M.; Lecturer in Law in the University of Malaya, Singapore.

# COOK *v.* LEWIS RE-EXAMINED

In *Cook* v. *Lewis* [1] a party consisting of A, B and C was grouse-shooting in the vicinity of Quinsam Lake on Vancouver Island. X, Y and Z made up another party which was similarly engaged. As A, B and C in line approached a clump of trees, Z, who saw them and anticipated danger to X, who was in that particular thicket, called out a warning. This warning was misunderstood by A, who thought that Z was referring to B's dog, and B said that he did not hear it at all. Just then a covey of grouse flew up, both A and B fired, there was a scream from the thicket and X appeared. He had been shot in the face and eventually lost the sight of an eye.

At the trial the jury, possibly because they misunderstood the direction of Wood J., the trial judge, found that neither A nor B had been negligent. The point hardly matters since in the outcome both appellate courts had little difficulty in deciding that the finding of the jury was perverse. There was then only one point of real difficulty: who did it?

How the trial judge approached this problem has to be culled from the judgments of the appellate courts. Both A and B, of course, denied shooting X, but neither explained quite what happened. A said he took the bird which was nearest his side, and B said he took a bird straight ahead of him, but this was not apparently related to the relative positions of A, B and X which might have resolved the matter without undue difficulty. As it was Wood J. explained to the jury that the onus of proving negligence lay on X, and then gave the jury certain questions to answer. One of these questions was:

> "If the plaintiff was shot by one of the defendants, are you able to decide which one?"

The jury said they were not, and Wood J. entered judgment for the defendants, A and B.

The Court of Appeal for British Columbia ordered a new trial.[2] Delivering the judgment of the court Sidney Smith J.A. did not appear to consider the case unduly difficult. He thought that if the jury had been properly directed, *viz.*, directed that as between A and B they had only to decide which one was the more likely to have shot X, they would have been able to resolve the matter on the available evidence. There are indications in the judgment that he himself was pretty sure which one it was, and he evidently did not consider that A and B were so placed that it was impossible

[1] [1950] 4 D.L.R. 136 (British Columbia C.A.); [1951] S.C.R. 830 (Canadian Supreme Court).
[2] [1950] 4 D.L.R. 136.

to discriminate between them. Thus far the case is unremarkable, but the Supreme Court, presumably taking the view that the facts were not so clear cut as the Court of Appeal fancied, tackled the much more interesting and difficult problem of what was the solution if, at the close of X's case, it was impossible to decide, even on the balance of probabilities, whether A or B fired the shot. To do this the obvious solution which suggests itself is that A and B must be forced into the position where they have to fight out the issue of liability between them. The majority judgments in this case indicate that this can be done. The purpose of this article is to show that it cannot.

The solution which appealed to Rand J. was to shift an evidential burden to A and B calling on each of them to exonerate himself if he could. It is well known that if a plaintiff has established a prima facie case of negligence an evidential burden may be placed on the defendant—*res ipsa loquitur* [3]—but there was a real difficulty in harnessing this doctrine to the facts of *Cook* v. *Lewis*. Where *res ipsa loquitur* applies the plaintiff has shown, and it has always been assumed that he must show, that the defendant had control or management of the event. In *Cook* v. *Lewis* X had not reached this position since he could not show whether it was A or B who was in control.

Perhaps surprisingly, there was little in the authorities to go on, so it is worth examining one English case, even though it was a criminal case, in which the point was squarely raised; a case which was not cited in *Cook* v. *Lewis*. In *Richardson* [4] A and B approached X in the street and in a manner which left X in no doubt as to their intentions asked him what money he had. X said that he had but twopence halfpenny, whereupon one said to the other, " If he really has no more do not take that," and turned to go away. The other, less generously inclined, stayed to rob X of this pittance. At the trial X could not say which one had made the statement, nor which one had robbed him. Deciding that the one who had desisted was not guilty of robbery, it was held that both must go free since guilt could not be established against either. Buller J. said:

> " It is like the *Ipswich* case, where five men were indicted for murder and it appeared, on a special verdict, that it was murder in one, but not in the other four; but it did not appear which of the five had given the blow which caused the death, and the court thereupon said, that as the man could not be clearly ascertained, all of them must be discharged." [5]

This must, of course, be the inevitable result in a criminal case but it does not follow that the same result should be reached in a civil

[3] No comprehensive survey of this slippery doctrine will be attempted here. For the purpose of this article it is assumed that the doctrine does no more and no less than place an evidential burden on the defendant.

[4] (1785) 1 Leach 387; 168 E.R. 296.

[5] At p. 388.

case.[6] Nevertheless it is unfortunate that Rand J. did not refer at all to the rule in criminal cases [7] in coming to his conclusion that in a civil case involving an identical point the rule did not apply. But Rand J. did have his reasons for coming to his conclusion. He felt that A and B were required to exonerate themselves if they could because what the guilty party, the one who had in fact injured X, had done was not only to have injured X but also,

> " in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with the environmental circumstances, he has, in effect, destroyed the victim's power of proof." [8]

Pausing there, two criticisms might be offered. It is difficult to see quite how it can be said that the plaintiff has a remedial right to the proof necessary to establish his case. It is a startling proposition, if it is a fair inference from what Rand J. says, that nursing staff assisting at a negligently conducted operation may be called on for an explanation simply because, had they not been there, it would be so much the easier for the plaintiff to ascertain the negligent party.[9] Again, Rand J., with respect, seems to beg the question. It may be acceptable that the guilty party should have to exonerate himself because he has put X in this predicament, but at this stage it is not known who is the guilty party, and the principle, as it stands, cannot be applied to the innocent party.[10] Rand J., however, meets this objection by saying that the innocent party is not really innocent anyway. True, the innocent party did not injure X, but by firing his gun in the particular circumstances he was negligent in the sense that he was in breach of a duty owed to X even if he did not commit the tort of negligence, and thus says Rand J.,

> " The onus attaches to culpability, and if both acts bear that taint, the onus or prima facie transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them." [11]

6 Dr. R. M. Jackson states that in bastardy proceedings the complainant may fail because she can show only that one of two men must be the father of her child: *Machinery of Justice*, 2nd ed., p. 108, note 1. See also Dr. Glanville Williams, 4 *Current Legal Problems*, 170. No authority is cited by either and I have been unable to find any specific authority.

7 The point had been taken; it is mentioned in the judgment delivered by Cartwright J.

8 [1951] S.C.R. at p. 832.

9 If this is not a fair inference then the principle enunciated by Rand J. would seem to have no utility at all.

10 The terms " guilty party " and " innocent party," though somewhat inelegant, mean throughout this article the defendant who actually caused the harm and the one who did not, respectively.

11 At p. 833.

If this is indeed so, and the onus can be shifted on this ground, it is difficult to see why Rand J. felt it necessary to make use of the other more elaborate, and more doubtful, argument at all.

This second argument is apparently attractive and has found its supporters.[12] Dr. Glanville Williams supports it [13] and would be prepared to take it even further. He says,

> " The recognition of this principle is an important contribution both to the law of tort and the law of evidence. It makes a big exception to the rule, recognised by the judges, that where a plaintiff cannot establish which of two defendants did the damage he must generally fail. It seems that this rule now operates only where one defendant (but it cannot be said which) was wholly free from blame. One may, indeed, question whether the rule is a good one even when limited in this way. To deny a remedy means that justice is certainly not done, to give a remedy would mean a fifty per cent. possibility that justice is done." [14]

Not perhaps entirely unexpectedly, Lord Denning also supports the principle, and in *Roe* v. *Minister of Health* [15] he said, *obiter*,

> " If an injured person shows that one or other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation." [16]

This, it might be noted, appears to favour [17] the wider proposition contended for by Dr. Williams; there is no suggestion it should be shown that both defendants are in breach of duty towards the plaintiff in order to justify calling on them both for an explanation.

Despite this strong support it is hard to see on what legal principle the evidential burden can shift to the defendants. There may be something to be said for doing this on the grounds of justice or fairness, but even that is debatable. It is suggested that it may be equally unfair that an innocent defendant, particularly if he is not even in breach of any duty of care, should be put to the trouble of proving the plaintiff's case. If the justification given is

12 Apart from the authorities cited in the text the decision is, or seems to be, supported by Street, *Law of Torts*, 2nd ed., 137n.; Winfield, *Tort*, 6th ed., by T. Ellis Lewis, 501; Salmond, *Torts*, 12th ed., by R. F. V. Heuston, 429; Hart and Honoré, *Causation in the Law*, 377; Prosser, *Law of Torts*, 2nd ed., 231; Fleming, *Law of Torts*, 295.

13 In a comment on *Cook* v. *Lewis* in 31 Can.B.R. 315.

14 *Op. cit.* at p. 317.

15 [1954] 2 Q.B. 66.

16 *Loc. cit.* at p. 82. This remark was clearly *obiter* since the *ratio* on this point was that the defendant was in any event vicariously liable for the acts of all the persons who might have been negligent, so here it was unnecessary to ascertain the actual wrongdoer had the court decided that someone was negligent. If one employer is in control the doctrine of *res ipsa* can always be invoked against him though it could not be invoked against his servants individually. Would it make any difference in cases of this kind if all the defendants were insured, though not employed by, the same insurance company? Not as the law stands, but a very special exception for a case like this is hardly objectionable in principle.

17 There is another possible explanation of this dictum which is discussed below.

that the innocent defendant will be in a better position than the plaintiff to know what happened, it might be countered that the innocent defendant will be usually as much in the dark as the plaintiff. Of course, the innocent defendant may know that he did not do it, but that does not mean that he is in the best position to prove that he did not do it. It seems quite likely, for example, that a doctor or nurse in an operating theatre may have as little idea how a swab or piece of tubing found its way into the plaintiff's gut as the comatose plaintiff himself. Suppose, to take another example, that A and B live in adjoining houses abutting a highway and both own somewhat similar-looking Alsatian dogs. A and B fail to exercise any proper control over their dogs which frequently wander into the highway and are an obvious source of danger. On one occasion one of the dogs wanders into the road causing Y, a motorist, to swerve and run down X. Both X and Y see the dog return to the house of A or B, but are not sure which, nor can they subsequently identify the dog which caused the accident. There is now evidence that either A or B was negligent but if called upon for an explanation neither may be able to give one. If they were both out of town or in bed at the material time in the belief that their dogs were lying quietly in their kennels, they are in a much less fortunate position to prove what happened than either X or Y.

It is suggested that in a situation of this nature X must fail because at the end of his case he has not established a prima facie case of negligence against either. The decision of Tucker J. in *Morris* v. *Winsbury-White* [18] supports this view. X had been operated upon by A and his subsequent treatment in hospital required the frequent insertion and removal of tubes in X's body. After discharge from hospital X continued to suffer pain and it was discovered that a portion of tube had been left in X's bladder. X relied on the principle of *res ipsa loquitur* on the basis that either A, or the persons for whom he was in law responsible, was prima facie negligent. Having decided that A was not liable for the negligence, if any, of the nursing staff, Tucker J. said that it was impossible to call the principle in aid—

> " The whole case, as presented by the plaintiff, is that this tube got in, I do not know how, between November 27 and February 10, during the time when he was at the hospital, and while he was being dealt with and treated by numerous nurses and sisters, and two resident medical officers and being visited occasionally by the defendant. He was by no manner

[18] [1937] 4 All E.R. 494. If these facts arose today it is thought that the plaintiff would succeed in view of *Roe* v. *Minister of Health* so long as he could show that someone was negligent. However, the reasoning of Tucker J. is unaffected by this because a different system prevailed in 1934. *Cf.* the judgment of McNair J. in *Roe* v. *Minister of Health* [1954] 2 Q.B. 67, especially at 69.

> of means in the control or charge or power of the defendant throughout the whole period, and I think, the doctrine of *res ipsa loquitur* is quite inapplicable to the facts in this case. I think that it is the plaintiff's duty in the ordinary way, before he can succeed in this action, to establish by evidence, either out of the mouths of the witnesses that he has himself called or by the witnesses called for the defendant, that the defendant has been guilty of some act of negligence, personally guilty of some act of negligence, which resulted in the presence of this tube in the plaintiff's bladder." [19]

Again, it seems to be tacitly assumed in the judgments of the Court of Appeal in *Baker* v. *Market Harborough Industrial Co-operative Society, Ltd.*,[20] that if at the end of his case X has failed to show which of two defendants was negligent then he fails. This last case has other important aspects which bear upon this problem and will be dealt with below.

There is, nevertheless, a distinction between *Morris* v. *Winsbury-White*, or the illustration concerning the dogs, and the situation in *Cook* v. *Lewis*. In *Cook* v. *Lewis* the innocent defendant was, or was assumed to be, in breach of a duty of care, whereas in *Morris* v. *Winsbury-White* there was no evidence that all the doctors and nurses were in breach of their duty to take care. To go back to the dog illustration, the analogy to *Cook* v. *Lewis* would be complete if it were further supposed that at the time of the accident both dogs were running wild on the highway. It is still known that only one dog caused the accident because the other dog was, let us suppose, running around on the highway fifty yards farther on.[21] It might be argued that it was now known that both the dog owners, A and B, were in breach of their duty to road users to take care, and this sufficiently distinguished it to justify placing an evidential burden on A and B. This aspect of the problem is more conveniently considered below.

Another point which arises out of *Cook* v. *Lewis* and *Morris* v. *Winsbury-White* is that in the former it was a choice between two: in the latter between many more. Supposing that the principle applies at all, is there an upper limit on the number of defendants against whom it may be invoked? On this view the two cases might be reconciled. There are few suggestions that it might apply where there are more than two defendants, so it is worth examining the decision of the California District Court of Appeal in *Ybarra* v. *Spangard* [22] where the problem arose. Here X awoke after an operation, involving the removal of his appendix, with a sharp

[19] At p. 499.
[20] [1953] 1 W.L.R. 1472.
[21] The situation would be quite different if the dogs were acting in concert. See *Arneil* v. *Paterson* [1931] A.C. 560 (H.L.).
[22] 208 P. 2d 445 (1944); for an account of this case and some acute criticism see Professor Seavey, "*Res ipsa loquitur: Tabula in Naufragio*," 63 Harv.L.R. 643.

pain between his neck and right shoulder which was shown to be caused by a strain or pressure applied at this point. The trouble did not respond to treatment and the muscle of the right shoulder began to waste away. X brought his action against A, B and C, three doctors engaged in the operation, D, the doctor who owned and managed the hospital, and E and F, two nurses also engaged in the operation. All that X could show was that he had not suffered any pain at this point before he entered the theatre, and that as he was laid on the operating table he felt two hard objects pressing into his back just below the neck. At the trial none of the defendants offered any evidence and X was non-suited by the trial judge. The Court of Appeal, however, ordered a new trial, holding that *res ipsa loquitur* applied so that those defendants who had any control over X's body or the instrumentalities which may have caused the injury were called upon to meet the inference of negligence and give an explanation of their conduct.[23]

On one view this brave attempt to do justice is commendable. After all, as the court pointed out, a person on an operating table is in a somewhat invidious position when it comes to showing what happened to him when he was unconscious. On a rational view it is difficult to accept that the problem of proof can be resolved by this device. As Professor Seavey says,

> "To extend the doctrine [of *res ipsa loquitur*] to a situation where a series of people are seriatim in control or in partial control of the plaintiff or his things and where the injury may have occurred by the act of any one of them unobserved by the others is using the doctrine to accomplish a result without reference to the reasons for it or to its limitations." [24]

It is thought that it is very difficult to resist this conclusion, since if the evidential burden were shifted in this fashion it would involve a radical departure from common law modes of proof. Even so, Professor Seavey appears to approve of utilising the principle of *res ipsa loquitur* when it can be shown that all the defendants were in breach of their duty to take care, and supports *Summers* v. *Tice*,[25] an American case on all fours with *Cook* v. *Lewis*, where the choice was again which of two defendants was liable.

It is now appropriate to examine the judgment of Cartwright, Estey and Fauteux JJ., delivered by Cartwright J. and given in X's favour in *Cook* v. *Lewis*. They appeared to see a further problem which was unresolved by Rand J., *viz.*, even supposing

[23] The case was decided by the C.A. on this basis only. Whether D, as the hospital authority, was vicariously liable for any negligence on the part of A, B, C, E and F was not discussed, nor apparently raised.

[24] 63 Harv.L.R. 646.

[25] 5 A.L. R. 2d 91 (1948); Smith and Prosser, *Cases and Materials on Torts*, 421.

that A and B were called upon for an explanation,[26] what happened if this resulted in a further impasse in that the jury could still not decide which of the two was the more likely to have caused the injury? It may be that A and B are unable or unwilling [27] to exculpate themselves. Their cases may rest on a simple denial of liability, and if their credibility remains unshaken the problem is unresolved. There are now only two possible solutions: to hold both or to hold neither liable.

The former was preferred in *Ybarra* v. *Spangard*. At the second trial all that each of the defendants was able to say was that he did not do it and he did not know who did. The trial judge thereupon found against all the defendants and in this he was upheld by the Court of Appeal. Similarly in *Cook* v. *Lewis* Cartwright, Estey and Fauteux JJ. did not shrink from this conclusion. In so doing, they adopted the following statement from an American case,

> " We think that . . . each is liable for the resulting injury to the [plaintiff], although no one can say definitely who actually shot him. To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence." [28]

This is a bold way to resolve the problem. It has two advantages in giving the plaintiff a remedy and making sure that the guilty party pays something for the injury which he has caused.[29] It has, however, the serious disadvantage that it involves an innocent party in the payment of damages when he has committed no tort. Here, again, there are two situations which must be treated separately.

[26] There is nothing in the judgment of Cartwright J. which clearly indicates that an evidential burden would shift. In fact precisely the opposite was inferred, but it was said that it was possible to hold A and B liable. In the event it would seem to be a six or two threes so far as A and B are concerned because in the absence of an explanation they are both going to be held liable.

[27] It is obviously very much in the interests of A and B to call no evidence and simply submit no case.

[28] *Oliver* v. *Miles* 144 Miss. 852 (1926). It seems from the judgment in *Summers* v. *Tice* that the hunters in *Oliver* v. *Miles* were held to be joint tortfeasors. This was not the *ratio* of *Cook* v. *Lewis* which more nearly parallels that of *Summers* v. *Tice*.

[29] In *Summers* v. *Tice* the court said that the wrongdoers are in no position to complain of uncertainty. The same sort of argument would be used by Dr. R. M. Jackson and Dr. Glanville Williams to justify making both A and B contribute to the upkeep of a bastard when it is known that one of them is the father (see note 6, *supra*). It is interesting to note that this was the course adopted in the U.S.S.R. but it proved to be defective because none of the " fathers " felt wholly responsible. Hence the law was changed in 1926 to require the courts to select one person only as father. In *L.* v. *Vinogradov and Lebleu*, No. 358 (1930) 10 Sud. Prak. RSFSR 19, X, during a drinking party at a friend's home, had sexual intercourse with A and, immediately thereafter, with B. X was unable to prove whether A or B was the father. The trial court, apparently acting on no other basis but that he was the first in time, declared A to be the father. The Supreme Court refused to interfere unless A could prove that he was not the father. See Hazard, *Law and Social Change in the U.S.S.R.*, 250.

1. *Where it is known that some one of the defendants is entirely innocent*, i.e., *not even in breach of any duty to take care.*

An illustration of this is provided by the case supposed where the dog causes the accident on the highway and only one dog was seen to be on the highway at the material time. It was also inevitably the case in *Ybarra* v. *Spangard* because it could not be reasonably inferred that all six defendants were in breach of their duty to take care. Here it is submitted that to hold all the defendants liable because the actual wrongdoer is unknown would be little short of monstrous. It involves saying that an entirely innocent defendant can be made liable in damages because, through the existence of circumstances over which he has no control, except perhaps intermittently, he is at the scene of the commission of a tort by some person or persons unknown. It involves saying that because the defendant cannot prove his innocence, his guilt is to be assumed, and that is clearly wrong. For this reason the broad proposition sought for by Dr. Williams, and apparently also by Lord Denning, cannot be supported. It was accepted by Smith J.A. in *Cook* v. *Lewis* as self-evident that if the jury found that the defendant who did not shoot X was shooting " in the clear " [30] so as to be acting in a perfectly prudent and careful manner then both defendants could not be made liable if the jury was unable to decide which one.

2. *Where it is known that some one of the defendants did not cause the injury, but it is shown that all the defendants were in breach of a duty to take care.*

The " guilt " or " fault " or " blameworthiness " of the innocent defendant here lends colour to the view that he can, in fairness, be called upon to pay damages along with the guilty defendant. This same argument, as has been shown, has also been used to justify placing an evidential burden on A and B to exculpate themselves. At whichever stage it is used it is suggested that it gives rise to much the same sort of difficulty and it is therefore convenient to deal with the whole argument at this point.

Whether the " fault " of the innocent party is used to justify shifting the evidential burden or to hold both defendants liable in the absence of exculpation by one, there is a superficial attractiveness in it. In *Cook* v. *Lewis* it would ensure that X got some compensation for his dreadful injury, and not be robbed of this by a fortuitous, and unfortunate, combination of circumstances, by no more than a twist of fate. To deny a remedy to X, as Dr. Glanville Williams points out, means that justice is certainly not done: to give a remedy would mean a 50 per cent. possibility that justice is done. Well, of course, it is hard on X if he is denied a remedy, but in fact it is no more hard on X to deny him a remedy

[30] [1950] 4 D.L.R. 138.

here than to deny him a remedy when he has been injured on the road by a hit-and-run driver who cannot afterwards be traced. In both cases X has a right without a remedy; in both cases the reason for this is the same—he cannot show who injured him. In the one case he comes much nearer to proving it than the other, but surely his remedy depends not on how near he comes to proving his case but whether he has actually proved his case? Once admit that X may have a remedy if he comes fairly near to proving his case and it becomes hard to say how near he must come: at present the line is fixed, certain and just—the plaintiff must prove that it is more probable than not.[31]

In so far as it is said to be fair to make an innocent defendant liable, on the ground that he is in breach of duty towards X, this seems to involve a misuse of the term " duty " and also the very negation of the ordinary principles of causation. It is a misuse of the term " duty " because being in breach of duty *in this sense* is no wrong to X. " Duty " is a word which is capable of having several meanings. Most commonly, perhaps, it means an obligation to respect a right and here the breach of the duty incurs liability for the wrongdoer. In the law of tort, and particularly in the tort of negligence, however, " duty," or more properly " duty of care," is not used in this sense. It is used to prescribe the limits within which a wrong may be committed and is determined by various social, economic or historical factors. The breach of the duty to take care is thus no wrong to anyone: it is merely an antecedent condition to the commission of a wrong.[32] A simple illustration of the difference between these two senses in which the term " duty " is used is provided where A carelessly overtakes in his car on the brow of a hill. Here A may be convicted of careless driving because he is in breach of his duty to respect section 12 of the Road Traffic Act, 1930; at the very moment he drives carelessly A incurs a liability to punishment—nothing further is required. But in this very same situation A incurs no sort of civil liability whatever to other road users whose safety he may have endangered. To them A owes nothing unless and until he causes some real injury to their persons or property. To say that A is in breach of his duty to take care only tells us that A might have incurred a liability had he injured someone: that alone shows the

[31] This need not be impossible for the plaintiff, and the court can, by legitimate means, go a long way to help him. In *Beckett* v. *Newalls Insulation Co. Ltd. and Another* [1953] 1 All E.R. 250, the C.A., reversing the trial judge, drew the inference that A rather than B had been negligent on the barest possible inferences.

[32] The legal duty in the strict sense of Hohfeld's analysis in the tort of negligence is the duty not to injure the plaintiff, and thus not to infringe the plaintiff's correlative right to security for his person. " Duty of care " does not have as its correlative any such strict right because infringement of this so-called right does not give rise to a claim. See Hohfeld, *Fundamental Legal Conceptions*, 35 *et seq.*, and especially at p. 38: " If . . . we should seek a synonym for the term ' right ' in this limited and proper meaning, perhaps the word ' claim ' would prove the best."

breach of duty itself involved A in no liability whatever. The injury lies in the *actual* negligent invasion of the plaintiff's person or property; to put it shortly: the injury lies in the damage.[33]

Even so it is perhaps still tempting to brand the defendant's conduct as wrongful where he is in breach of a duty to take care. The very word " wrongful "—which is commonly used—is significantly telling, because it is a tacit admission that the conduct of the defendant is not tortious.

From this it must be concluded that a defendant can only be liable where he is shown on the balance of probabilities to have caused the damage. In *Cook* v. *Lewis*, and the other similar situations, this requirement was patently absent. Unless it can be shown that the defendant caused the damage he has not been shown to have committed any tort, and if he is not shown to have committed any tort the plaintiff fails.[34]

Finally, some mention must be made of two ways in which the problem posed by *Cook* v. *Lewis* can be restricted so that it must arise very rarely.

The first is where it is possible to hold that both or all the defendants are joint tortfeasors. Here it is unnecessary to select the hand which struck the blow and the plaintiff's remedy is assured. In *Cook* v. *Lewis* none of the judges felt that it could be said that A and B were joint tortfeasors, since, as Cartwright J. said,

> " To do so would bring about the result that every member of a party going out together, with a lawful common object, social or sporting, which could be carried out without negligence, would be vicariously liable for the negligence of any member of the party."

On the similar facts of *Summers* v. *Tice* the Supreme Court of California seems at times to toy with the notion that the hunters could be joint tortfeasors but the *ratio* of this case appears to be the same as that of *Cook* v. *Lewis*. In cases of this kind it is tempting to strain the notion of joint tortfeasors as far as possible and so obviate the problem but there are obvious limits to what can be done in this way and it is clear that it cannot dismiss the problem altogether.[35]

The second is where it is possible to find that both or all of the defendants were several concurrent tortfeasors.[36] Here A and B

[33] *George Monroe, Ltd.* v. *The American Cyanamid and Chemical Corporation* [1944] 1 All E.R. 386 is some authority against this but different considerations applied here and, anyway, it has been subjected to criticism on this point in, *e.g.*, Dicey, *Conflict of Laws*, 7th ed., 968; Cheshire, *Private International Law*, 4th ed., 269.

[34] This is really the point which Locke J. makes in his dissent in *Cook* v. *Lewis*, unfortunately, perhaps, all too briefly.

[35] The third *ratio* given in the headnote to *Brook* v. *Bool* [1928] 2 K.B. 578 goes some way to meeting *Cook* v. *Lewis* but not far enough.

[36] The expression is borrowed from Street, *Law of Torts*, 2nd ed., 495, where several concurrent tortfeasors are defined as " those whose acts combine to produce the same damage." By and large this class is treated in the same way as joint tortfeasors.

are both liable if, on the balance of probabilities, it can be said that the acts of both contributed to the injury. This could not be done in *Cook* v. *Lewis* because it was known that the acts of one did not cause any injury at all, but the facts of *Cook* v. *Lewis* do not have to be altered very much to bring them within this category. If there was proof that both A and B fired towards X and X received two wounds, say in the face and chest, then the probability is that both injured X even though it is on the cards that both wounds might have been caused by shot from the one gun.[37] A good illustration of this is *Baker* v. *Market Harborough Co-operative Society, Ltd.*[38] A motor-lorry, driven by A, collided with an Austin van, driven by B, when both were travelling towards each other on a straight road, during the hours of darkness. Both A and B were killed and the evidence of the witnesses and the police, who took various measurements after the accident, was not very satisfactory. There was some evidence that the offside wheels of B's van were over the cat's eyes which marked the centre of the road, but this evidence was not really compelling. Claims arising out of this collision were brought by A's wife against B's employers and by B's wife against A's employers. The former was heard by Ormerod J., who felt it impossible to say whether B had been negligent or not and so he entered judgment for the defendants. The latter claim was heard by Sellers J., who, accepting the same facts as Ormerod J., drew the inference that both A and B were negligent and apportioned the blame equally between A and B. The inference drawn by Sellers J. was the one preferred by the Court of Appeal.

Somervell L.J. agreed with Sellers J. because he took the view that the only reliable evidence was that A and B had collided on a straight road, and the only reasonable inference from this was that both drivers were committing the same acts of negligence, *viz.*, failing to keep a proper lookout, hugging the centre of the road and failing to take any evading action, and were therefore equally to blame. But there seems little doubt that if the inference had been that only one of the drivers had been negligent, and it was impossible to say which, then Somervell L.J. would have held that the plaintiff failed. He said,

[37] See *Beecham* v. *Henderson* [1951] 1 D.L.R. 628.

[38] [1953] 1 W.L.R. 1472. See also *Bray* v. *Palmer* [1953] 2 All E.R. 1449; *France* v. *Parkinson* [1954] 1 All E.R. 739. The line between these cases, where an inference of negligence can be drawn against all defendants, and those cases where an inference cannot be drawn against any defendant (*e.g.*, *Wakelin* v. *London & S.W. Ry.* (1886) 12 App.Cas. 41) is no more than a hair's breadth at times. See, *e.g.*, *Salt* v. *Imperial Chemical Industries and Another* (1958) *The Times*, January 31. It is a pity there is no fuller report of this case since all the facts are of great significance. This case did not raise the issue of negligence in one or other of the defendants because there was no sufficient evidence that anyone had been negligent.

> "It is, of course, possible that a plaintiff injured by negligence may fail because he is unable to establish whether the negligence was A's or B's."

Denning L.J. would have held both A and B equally to blame even supposing that B, the van-driver, was over the centre of the road, because, he felt, if this clearly showed B to be negligent it did not mean that A was not. If A had seen, as he ought to have seen, that B was over the centre of the road he ought to have taken avoiding action and there was no evidence that he did, so there was still an inference of negligence against A. It is this case which the learned judge cited in *Roe* v. *Minister of Health* to support the proposition given above. Indeed, very much the same language was used in the *Baker* case when he said:

> "On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle to blame or both of them, refuse to give [a passenger in one of the vehicles] compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame." [39]

Nevertheless, it is respectfully suggested, there is a clear difference between the situation which arose in the *Baker* case and the one which Denning L.J. predicated in *Roe* v. *Minister of Health*. In the former it was a probable inference that both defendants were to blame, in the latter that one only was to blame. That there is a significant distinction between these two situations was recognised by Denning L.J. himself in the *Baker* case when he said,

> "It is very different from a case where one or other only is to blame, but clearly not both."

It may be that in *Roe* v. *Minister of Health* Denning L.J. thought that there was an inference of negligence against all the defendants in the handling of the ampoules, *i.e.*, each and everyone had contributed to the cracking of the ampoules; in which case all would be concurrent tortfeasors and all liable to the plaintiff. If this is so then what he said can be squared with the *Baker* case, and there is nothing untoward about it. This does not appear very

[39] At p. 1476. Even in this form it is thought that Denning L.J. goes too far, though Somervell L.J. supports this to the extent of saying (at p. 1475), "If [the plaintiff's] difficulties are due to any failure of A or B or both to call available evidence, adverse inferences may be drawn." It seems curious that because the defendants, in effect, submit no case, a perfectly legitimate step to take, this very fact is an item of evidence which can be used to draw adverse inferences against them.

likely, however, when the facts of *Roe* v. *Minister of Health* are examined, since it is difficult to see how it could be said that it was more probable than not that all the defendants were negligent. It seems, therefore, that Denning L.J. sought to extend the principle of the *Baker* case in *Roe* v. *Minister of Health* and the extension cannot be supported.

So the conclusion must be that unless all the defendants are joint, or several concurrent, tortfeasors the plaintiff must fail if from a number of defendants he cannot put his finger on the tortfeasor even though it is proved that the tortfeasor must be one of them. It is thought that this conclusion is not only the inevitable conclusion in law but also the conclusion which is required by good sense. The quarrel with *Cook* v. *Lewis* is not on the narrow ground that it creates an anomalous exception to the ordinary modes of proof, but on the broader ground that it fails to give to the interests of the defendant the same consideration which it readily accords the plaintiff.

T. Brian Hogan.*

* Lecturer in Law, University of Nottingham.

# THE DEVELOPMENT OF THE LAW OF TORTS IN ISRAEL

## I

ARTICLE 46 of the Palestine Order in Council provides that the jurisdiction of the civil courts shall be exercised in conformity with the Ottoman law in force in Palestine on November 1, 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such Orders in Council, Ordinances and regulations as are in force in Palestine, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, provided always that the said common law and doctrines of equity shall be in force so far only as the circumstances of Palestine and its inhabitants permit and subject to such qualification as local circumstances render necessary.

The said article of the Palestine Order in Council formed at the time of the Mandate the basis of the jurisdiction of the courts, as far as the law of torts was concerned. During the twenty-eight years of the Mandate, the law of torts developed slowly, if at all, and this was due to various factors. The Ottoman law, as far as it applied to Palestine and its inhabitants, made very little provision for compensation for injuries to the person, and the Supreme Court of Palestine hesitated to introduce the English law of torts into Palestine by way of article 46 of the Palestine Order in Council. This state of affairs resulted in a deplorable situation. In Civil Appeal 88/30 [1] the Acting Chief Justice summarised the facts of the case before the court as follows:

> " The Municipality of Haifa had dug a trench or ditch in a public road, had left it unprotected and unguarded and a certain Dr. Caesar Khoury whilst using the said public road had unwittingly fallen into the same, thereby fracturing his right shoulder-blade."

The learned judge continued:

> " the question for this court to decide is the measure of damages, if any, respondent is entitled to, and unfortunately for this purpose the Mejelle, as might be expected from a body of law created to meet the needs of an agricultural community, devotes considerable space to the subject of damages done by animals, but in the main is silent with regard to injuries caused to the person."

[1] *Rotenberg Collection of Judgments*, Vol. III, p. 1343.

The learned judge then proceeded to quote Civil Appeal No. 2 of 1927, *Rosenberg* v. *Zaidan*,[2] where the appellant claimed "the amount of medical treatment he had undergone in consequence of the respondent having knocked him down whilst riding and in charge of a motor-car." The court in that case had held:

> "It was clear that apart from any criminal responsibility and putting aside the special case of compensation for homicide or injury to a member there is in general a civil liability to make good any damage caused which liability may, however, be prevented from arising by the special circumstances of the case."

The learned judge commented: "With this judgment I cannot altogether agree and am of opinion that the Mejelle does not in fact deal with injuries to the person. . . ." Frumkin J., whilst agreeing with the judgment of the Acting Chief Justice, pointed out:

> "All the articles in the book of destruction are dead silent in regard to any damage or injury caused to the person. Bearing in mind the scrupulous care which the draftsmen of the Mejelle have displayed in framing the articles, it can hardly be assumed that the omission of reference to injuries to the person is only the result of an oversight or unthoughtfulness. . . . Now when we come back to the case before us, we find that it is not an application for *diyet* (blood money) or compensation in lieu of *diyet*, indeed it is not a case in which such an application could be made and maintained under the law of Palestine. The only law in favour of Dr. Khoury is article 183 of the Penal Code entitling him to claim surgical expenses from the Haifa Municipality. . . ."

The introduction of the English common law of torts was rejected by the Supreme Court of Palestine in Civil Appeal No. 113/40, *Sherman and Another* v. *Danowitz* [3] (against the vote of Frumkin J.). Copland J., with whom Khayat J. concurred, held:

> "This appeal raises the question whether the English common law can be applied in cases such as this of damage to the person through negligence. There have been several cases in the lower courts of this country, where it has been held that the law of torts is applicable in this country under the provision of article 46 of the Order in Council, but there has hitherto been no definite judgment of this court to this effect. In *Attorney-General* v. *Blam*, C.A. 18/39,[4] the point was raised, but the Chief Justice held that on the facts of that case it was unnecessary to consider it, since the act of negligence alleged was failure to erect gates at a railway level crossing and since the obligation to erect gates was in England a statutory one, no question of the common law arose, and the other judges concurred. Again in *Georg Jacobovitz Building Ltd. and Others* v. *Jawittz*, C.A. 62/40, which was a case of libel, the

[2] *Rotenberg*, Vol. III at p. 1337.
[3] *Current Law Reports*, Vol. 8, p. 17; see also p. 348, *post*.
[4] *Palestine Law Reports*, 247.

District Court had held that since there was no civil remedy for libel in Palestine the English law could be imposed, but no argument on the point was addressed to this court, so this case cannot be an authority on the subject, since this court expressed no opinion on this point. It is common ground that the Mejelle provides no remedy for injuries to the person, the reason possibly being that the Ottoman Criminal Code contained certain provisions dealing with cases of compensation where a person was injured. These provisions have now been repealed, and the only provisions now are, first section 43 of the Criminal Code, which allows a criminal court to award compensation up to £I100 where a person has been injured as the result of an act for which the perpetrator has been convicted.

" The respondent's case rests, therefore, entirely on whether the English law can be imported, and that depends on the applicability of article 46 of the Order in Council.

" Now what is the common law? In the sense in which it is used in the Order in Council it means, I think, customary law as opposed to statute law, and it includes rules of law derived from decided cases and other authorities—see *Odgers on the Common Law*, Vol. 1, p. 1. What is this customary law? It is the law founded on the customs and habits of the English people, developed and extended over many generations, but all the time based on their customs and their habits. And the customs and habits, mode of life, mode of thought and character of the English people are very different from those of the inhabitants of Palestine. This in itself would make it difficult to apply the English law of torts in its entirety to this country. It would be a grave injustice to force on another country a customary law which is founded on the totally different customs and habits of a totally different race. But there is another and a graver objection, to my mind, and that is that hardly anyone in this country knows what the common law is.

" The law of torts is contained in various textbooks, and in hundreds of decided cases, which the large majority of the people in this country cannot even read, because they are in English, and the same applies to a considerable number of the judges and magistrates, who would be called upon to enforce and apply it. It is not right or possible in my opinion to create a liability which may affect a large proportion of the population, when that population has no means of knowing what the extent of that liability is. It is a fundamental principle that people must have an opportunity of knowing what the law is. Again, the English law of torts has been largely amended by statute—if the courts of this country were therefore to enforce it, we should have to apply only the common law, since we cannot apply any statutory amendments—in other words we should apply, in its original customary form, a law which has been found unsatisfactory in certain respects in England—another injustice."

This judgment was referred to in a notice published by the Government of Palestine in the *Palestine Gazette* of December 28, 1944, as the reason for publishing on January 29, 1942, in the *Palestine Gazette* No. 1165 a draft Civil Wrongs Ordinance. With this Ordinance we are dealing below. Before this Ordinance in its final form came into force, the Supreme Court of Palestine changed its mind in Civil Appeal No. 29/47, *The London Society for Promoting Christianity among the Jews, and Others* v. *Lionel Alexander William Orr and Others.*[5] The action arose out of serious and permanent physical injuries suffered by the daughter of the respondent, a British judge, residing in Palestine when, as a new-born baby, she was under the care of the appellant society in its hospital in Jerusalem.

The Court of Appeal unhesitatingly and unanimously reversed its position. In dealing with the previous judgment given by the Supreme Court of Palestine the learned judge held:

> " In Civil Appeal 113/40 [6] the court by a majority decision were of the opinion that it would be a grave injustice to force on Palestine the common law of England which Mr. Justice Copland, who presided in that case, designated as a customary law founded on totally different customs and habits of a totally different race.
>
> " The general principle embodied in this decision would appear to have been questioned in a later case.[7] Moreover, since Civil Appeal 113/40 was decided the Privy Council delivered judgment in Appeal No. 30 of 1939 [8] which confirms our opinion that article 46 imported into Palestine far more of the common law of England than the court who decided Civil Appeal 113/40 supposed.
>
> " It seems to us that a perusal of the relevant cases discloses a sufficient conflict of judicial opinion on the issue to justify us in refusing to be bound by the previous decision of this court in Civil Appeal 113/40. We have come to this conclusion with less hesitation, as it might well be argued that, at the time when Civil Appeal 113/40 was decided, conditions in Palestine were such that it could reasonably be said that local circumstances did not render the application of this particular part of the common law necessary. We are satisfied, however, that those circumstances, if they ever did exist since the advent of the British administration, do not exist today. There is now in Palestine a population of 600,000 Jews with Western ideas of culture and Western ideas of commerce. There is a progressive Arab population of one and a half million, also with strong cultural and commercial ties with Europe."

Independently of the judicature, the Government of Palestine

[5] *Annotated Law Reports*, 1947, p. 364.
[6] 7 *Palestine Law Reports*, 1940, p. 363.
[7] C.A. 129/42, 9 *Palestine Law Reports*.
[8] 8 *Palestine Law Reports*, 1941, p. 116.

had published, as mentioned above, a draft Civil Wrongs Ordinance in 1942 which was further amended and republished in 1944.[9] In the notice referred to above the Attorney-General pointed out:

> " The draft Ordinance was modelled on the Cyprus Civil Wrongs Law, 1932, which substantially reproduced the English common law on those topics with which it dealt, modified by provisions of the U.K. Fatal Accidents Acts. It modified the provisions of the Cyprus law, however, by provisions based on those of the U.K. Law Reform (Miscellaneous Provisions) Act, 1934, and the U.K. Law Reform (Married Women and Tortfeasors) Act, 1935, which were enacted after the enactment of the Cyprus law.
>
> " Subsequent to the publication of that draft Ordinance further consideration was given to its text, partly in view of the comments of the public thereon, and, as a result, it was decided to make a number of amendments thereof and additions thereto, and those amendments and additions have been incorporated in the final text of the Ordinance. Among the most important amendments and additions were the exclusion of the English common law doctrine of common employment, which has been severely criticised of late by the highest judicial and legal authorities in England, the addition of two new civil wrongs, namely, injurious falsehood and assault, and the extension of the provisions of the Ordinance relating to libel so as to include slander, the term ' defamation ' being used to cover both such civil wrongs. Furthermore, the provisions of the draft Ordinance were amended so that the English common law rule whereunder a plaintiff in an action for damages for negligence must either succeed completely or fail completely in his claim should not apply, and the court should be empowered to apportion the compensation payable in respect of damage caused by negligence according to the degree of negligence of each of the persons whose negligence caused the damage. Finally, it was decided to take away the jurisdiction of the courts, other than the tribal courts, to award *diyet* or compensation in lieu of *diyet* in respect of acts constituting civil wrongs after the commencement of the Ordinance in view of the new remedies provided by the Ordinance for such acts, although persons will not be deprived of their right to settle their disputes out of court by payment of *diyet*.
>
> " The Ordinance, it will be observed, provides that only certain specified acts or omissions shall constitute civil wrongs and it does not contain any provision of a general nature providing for civil liability. This has been done deliberately, and, as experience of the working of the Ordinance is obtained, provisions for additional civil wrongs will be made if they are found to be necessary."

[9] *Palestine Gazette* of December 28, 1944, Supplement 1.

## II

The Civil Wrongs Ordinance came into force in Palestine only in 1947, *i.e.*, a short time before the termination of the Mandate. The Ordinance represents in many points a deviation from English common law and great caution is therefore required in applying English precedents for the purpose of interpreting the Ordinance. Attention may be drawn to the following points:

The Ordinance does not deal with the following torts which are well-known civil wrongs in English law, but are not actionable in Israeli law, as they are not included in the Civil Wrongs Ordinance:

Master and servant: claims for seduction and loss of service are not maintainable at the instance of the master.[10]

Again, no rights of action in tort appear to be vested in a parent in respect of his child in his capacity as a master of his child.[11]

Furthermore it is not a tort in Israel actionable at the suit of a husband to take away, imprison, or do physical harm to his wife.[12]

The Ordinance does not contain as actionable torts: Intimidation of a person, to his own or another person's injury,[13] nor does it contain the tort of conspiracy [14]; finally the torts of maintenance and champerty are not part of the law of Israel.[15]

The state is liable in tort in accordance with an amendment of the Ordinance which is called Civil Wrongs (Liability of the State) Ordinance, 1952.[16]

The liability of the state for its servants in Israel is based on the same principles in accordance with which a master is liable for the acts of his servant, provided that the state is not liable for a legal act done within its competence or in a bona fide exercise of its legal rights, but the legal liability for a negligent exercise of those powers remains in force.

The state is not liable for defamation nor for martial acts of the defence forces. The state is further not liable for damage suffered by anyone serving in the defence forces in the course of his service.

The state is not liable in its capacity as owner of property vested in it by virtue of a statute only, as long as the state has not taken actual possession thereof.

The immunities of the state in virtue of other legislation remain in force.

Article 6 of the Civil Wrongs Ordinance provides that a corporate body shall not recover any compensation in respect of any civil wrong unless it has suffered damage thereby.

In regard to minors articles 7 and 8 of the Ordinance provide

[10] See *Salmond on Torts*, 9th ed. at pp. 381 and 386.
[11] See Salmond, *loc. cit.* at p. 380.
[12] See Salmond, *loc. cit.* at p. 391.
[13] See Salmond, *loc cit.* at pp. 633 and 634.
[14] See Salmond, *loc. cit.* at p. 636.
[15] See Salmond, at p. 666.
[16] *Statute Book*, 1952, p. 339.

that a person under the age of eighteen years may sue and, subject to the provisions of article 8 of the Ordinance, be sued in respect of a civil wrong, provided that no action shall be brought against any such person in respect of any civil wrong when such wrong arises directly or indirectly out of any contract entered into by such person. Article 8 of the Ordinance provides that no action shall be brought against any person in tort when the tort was committed whilst such person was under the age of twelve years.

In regard to the relations between husband and wife provision is made in article 9 of the Ordinance *inter alia* to the effect that no action in respect of any civil wrong committed before or during the subsistence of a marriage shall be brought by either party thereto or any person representing his or her estate against the other party thereto or any person representing his or her estate.

Among other points of importance may be mentioned: The tort of injurious falsehood has found a precise definition in article 23 of the Ordinance.

> "Injurious falsehood consists of the publication maliciously by any person of a false statement, whether oral or otherwise, concerning—
>
> (*a*) the trade, occupation or profession, or
>
> (*b*) the goods, or
>
> (*c*) the title to property
>
> of any other person:
>
> Provided that no person shall recover compensation in respect thereof unless he has suffered pecuniary damage thereby."

In regard to the liability of the owner or occupier of any movable property to a bare licensee the former are, in deviation from English common law, bound to warn such a licensee not only in regard to concealed dangers or hidden perils in or upon such immovable property of which they knew, but also of such which they must be presumed to have known. The latter deviation from English common law is of special importance in applying English precedents to torts of this kind in Israel.

Special provision has been made for deduction of compensation payable to an injured person in virtue of the national insurance law and the subrogation of the National Insurance Institute in regard to the claims of the injured person.[17]

## III

The Civil Wrongs Ordinance has been interpreted and applied by a great number of judgments of fundamental importance by the Supreme Court of Israel.

(1) Whilst English precedents are treated by the courts of

[17] Para. 62 of Civil Wrongs Ordinance as amended by the Law of Amendments of Civil Wrongs Ordinance, 1956, and published in the *Sefer Chukim*, 1957, p. 51, para. 2.

Israel with great respect, the question, how far they are binding upon the courts of Israel, has been repeatedly dealt with by the Supreme Court of Israel. In Civil Appeals 81/55, 84/55, 91/55, 92/55, *Cochavi and Others* v. *Baker and Others*,[18] the question to be decided concerned the problem whether income tax payments, which would have had to be paid by the injured person from his regular earnings, but for the accident, had to be taken into account, when fixing the compensation payable by the wrongdoer. Witkon J. summarised the position [19] as follows:

> " The question remains to be answered whether income tax has to be taken into consideration which the respondent would have had to pay, when fixing the compensation for loss of his future earnings. . . . This question was raised on appeal only, because only after the conclusion of the case in the District Court the well-known judgment of the House of Lords in the case of *British Transport Commission* v. *Gourley* [20] was published, in which it was held that income tax has to be taken into account, when fixing loss of earnings, whereas prior thereto the courts of England decided to the contrary, following the rule of *Billingham* v. *Hughes* [21] and not only this . . . but the Supreme Court of Israel too decided in *Grossman* v. *Roth*,[22] following *Billingham* v. *Hughes* that the compensation has to be fixed without taking income tax into account.
>
> " The appellants therefore contend that after the rule has been reversed in England, we in Israel too should follow the new precedent and if in general we follow English precedents, then in this case—thus contend the appellants—we are bound to do this in virtue of the express provision of article 2 of the Civil Wrongs Ordinance, 1944, in accordance with which we have to interpret expressions used therein, in accordance with the principles of legal interpretation obtaining in England. And who, if not the House of Lords, is authorised to interpret the law of England?
>
> " This plea raises an important question, preliminary to the problem itself, whether indeed the House of Lords was justified in reversing the former rule. And this is the problem: In a case in which the Supreme Court of Israel gave a ruling and thereafter an English court—and be it even the highest in that country—gives another ruling, are we entitled, or even bound, to deviate from the Israeli precedent and to prefer the newer English precedent? For anybody who does not recognise the ' doctrine of binding precedents,' as did the minority in *Yehoshua* v. *Appeal Committee* [23] the question does not arise. . . . However, we have to examine the problem before us in virtue of the well-known ruling in *Ram* v. *Minister of*

[18] Piskei Din 1957, p. 225 (the Deputy President Cheshin J., Landau and Witkon JJ.).
[19] *Loc. cit.* p. 235.
[20] [1955] 3 All E.R. 796.
[21] [1949] 1 All E.R. 684.
[22] Civil Appeal 70/52, Piskei Din Vol. Vav, p. 1242.
[23] High Court Application 176/54, Piskei Din 1955, Vol. Tet, p. 617.

*Finance* [24] in which the court confirmed the rule that precedents are binding.

> " It is not difficult for us to reply to the question whether an Israeli court is bound by a new English precedent if and when no Israeli court has given its opinion on the same question. This problem was dealt with by the court at the end of the judgment in *Ram* v. *Minister of Finance*, but was not decided therein. . . . It is my opinion that English precedents do not bind us any more, even if they were given before the establishment of the state. These precedents have great force to guide and convince us, but do not bind our courts. . . I am convinced that the judgment of the Supreme Court in *Grossman* v. *Roth* and the decision of the English Court of Appeal in *Billingham* v. *Hughes* are correct, in holding that income tax should not be taken directly into account, when fixing the compensation due to the injured person."

The Deputy President, Cheshin J., and Landau J. arrived at the same conclusion and since then the President of the Supreme Court of Israel, Olshan J., has refused an application for a rehearing of a case involving the same question by a greater number of Supreme Court Justices.[25]

(2) The question of the definition of an invitee was decided in Civil Appeal 294/54, *Stern and Another* v. *Amir and Others*.[26] The judgment in this case was delivered by Agranat J., with whom Zussmann and Berinson JJ. concurred. The facts of the case were that a child of a tenant was killed whilst playing in the courtyard, not let to one of the tenants of the house, by falling into a well, which represented a concealed danger.

Agranat J. declined to follow the opinions expressed in *Fairman* v. *Perpetual Investment Building Society* [27] and *Jacobs* v. *London County Council* [28] and preferred the definition recommended by the Law Reform Committee of November 1954 and by the judgment of Scott L.J. in *Haseldine* v. *Daw* [29]:

> " I see no legal ground for making community of interest an essential criterion. . . . I cannot see how the separate interest of the visitor necessarily affects the duty of the occupier."

Agranat J. held that a material interest on the part of the landlord is sufficient to make a child of a tenant playing in the courtyard an invitee of the landlord and that there is no necessity of a common interest of the injured person and the landlord subsisting.

Agranat J. arrived at the conclusion that an invitee and a licensee of a tenant have to be regarded as an invitee of the

[24] High Court Application 287/51, Piskei Din 1954, Vol. Chet, p. 494.
[25] D.N. 23/58, Ruling of February 18, 1959.
[26] Piskei Din 1958, Vol. Yud-Beth, p. 421.
[27] [1923] A.C. 74.
[28] [1950] A.C. 361.
[29] [1941] 2 K.B. 343, 352.

landlord, when they are on their way to the flat let by the landlord to the tenant.

(3) In *Malka* v. *Attorney-General*, Criminal Appeal 47/56,[30] the Supreme Court dealt with the rule in *Re Polemis and Furness, Withy & Co.*[31] In this case the appellant was charged by virtue of article 218 of the Criminal Code Ordinance which has the following wording:

> " Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence unintentionally causes the death of another person, is guilty of a misdemeanour and is liable to imprisonment for two years or to a fine of one hundred pounds."

Although this decision was given in a criminal appeal the principles laid down in this case are of equal importance for a claim filed in tort. The facts of the case were that a child had been injured by a car driven by the appellant and had suffered a comparatively trifling injury. When treated by the medical practitioners, the latter found it unnecessary to administer an antitetanus injection as there was no open wound. Nevertheless the child died of tetanus about eight days after the accident. The District Court had held that the accused had been guilty of causing the death of the child in accordance with the provisions of article 218 of the Criminal Code Ordinance quoted above, applying the rule laid down in the *Polemis* case. The Supreme Court reversed this decision, declining to follow the rule in the *Polemis* case and referring to the rule in *Hadley and Another* v. *Baxendale and Others*.[32]

(4) Reference may finally be made to the judgment of the Supreme Court in Civil Appeal 123/50.[33] The Supreme Court of Israel in this appeal interpreted the tort of unlawfully causing breach of a contract in such a manner that the word " causing " was held to have a broad meaning including any act which in fact was material in causing the breach of a contract and did not require such act to be done with the specific intention of causing a breach of contract, it being sufficient that the perpetrator thereof was aware that such a breach might be a consequence of his act.

R. Gottschalk.*

[30] Piskei Din 1956, Vol. Yud III, p. 1543 (Silberg, Goitein, Berinson JJ).
[31] [1921] 3 K.B. 560. *Cf. Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co.* [1961] 2 W.L.R. 126.
[32] (1854) 9 Ex. p. 354.
[33] *Bauernfreund* v. *Dresner and Another*, Agranat, Sohar and Zussmann JJ.—Psakim Vav, p. 234.

* LL.M. (London), Barrister-at-Law, Advocate, Member of the Israeli Bar and Bar Council.

# COPYRIGHT AND THE STATUTE OF WESTMINSTER

In an article in Volume 23 of this *Review*,[1] Professor Hamish R. Gray submits that the controversy over the effect of section 4 of the Statute of Westminster, 1931, has been settled by a recent decision of the High Court of Australia. Section 4 provides that "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." The controversy turns on whether this provision merely lays down a rule of construction which, like any other rule of construction, can be displaced by words in a subsequent Act clearly indicating a contrary intention, or whether it goes further and has the effect of a permanent limitation on the sovereignty of the United Kingdom Parliament.[2] It is plain that this controversy, if it is not taken to be already settled by the well-known words of Viscount Sankey L.C. in *British Coal Corporation* v. *The King*,[3] could only be settled by the decision of a case arising under an Act of the United Kingdom Parliament which clearly purported to alter the law of a self-governing dominion without embodying the declaration required by section 4. Professor Gray believes that *Copyright Owners Reproduction Society, Ltd.* v. *E.M.I. (Australia) Pty., Ltd.*,[4] is such a case, but it is respectfully submitted that this view is mistaken.

The United Kingdom Act in question is the Copyright Act, 1956, and it is clear that, with one exception, its provisions operate initially as part of the law of the United Kingdom only. That this is so is shown by section 31, which gives power to extend any provisions of the Act by Order in Council so that they form part of the law of the Isle of Man, the Channel Islands, or any colony or protectorate. Unlike the Copyright Act, 1911, which it replaced, the Act contains no means by which it can be extended so as to form part of the law of a self-governing dominion. It is clear therefore that, for example, the provision of the 1956 Act which

1 "The Sovereignty of the Imperial Parliament," 23 M.L.R. 647.

2 This differs slightly from Professor Gray's statement of the controversy (at p. 647), which assumes that if s. 4 is not a surrender of sovereignty it has no effect at all. This misunderstanding is the clue to much of what follows.

3 "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities." [1935] A.C. 500, 520.

4 (1958) 32 A.L.J.R. 306.

repeals the 1911 Act could not apply to a self-governing dominion either initially or by extension. The exceptional provision referred to above, on which Professor Gray bases his argument, is paragraph 41 of the Seventh Schedule. Before considering this it is necessary to say a word about the mode of operation of the 1911 Act. This Act created an Imperial copyright area which covered the United Kingdom, the Isle of Man, the Channel Islands, the colonies, a number of protectorates and the self-governing dominions of Australia, Newfoundland and South Africa. In all these territories the 1911 Act applied of its own force as an Imperial Act and provided for a single copyright, subsisting throughout the Imperial copyright area, in works first published within the area or produced by a person who was a British subject or was resident within the area.[5] Therefore, for example, a book first published in the United Kingdom was entitled to copyright protection under the law of Gibraltar because the 1911 Act extended to both countries. When it was decided to repeal the 1911 Act as part of the law of the United Kingdom and replace it by a new Act which, although capable of extension by Order in Council to other territories for which the United Kingdom Parliament had unfettered power to legislate, would in the first instance apply only to the United Kingdom, it was clear that some interim provision was needed to preserve the Imperial copyright area intact in the laws of the dependent territories until the new Act could be extended to them. Otherwise the book first published in the United Kingdom might have lost its protection in Gibraltar because the 1911 Act no longer extended to the United Kingdom. For this reason there was included in the Seventh Schedule to the 1956 Act, which contained transitional provisions, the paragraph relied on by Professor Gray:

> "41. In so far as the Act of 1911 or any Order in Council made thereunder forms part of the law of any country [6] other than the United Kingdom, at a time after that Act has been wholly or partly repealed in the law of the United Kingdom, it shall, so long as it forms part of the law of that country, be construed and have effect as if that Act had not been so repealed."

The 1911 Act was repealed as part of the law of the United Kingdom on June 1, 1957,[7] but the 1956 Act was not extended to Gibraltar until June 1, 1960.[8] During the intervening three years the book first published in the United Kingdom continued to be protected in the law of Gibraltar because paragraph 41 provided that the 1911 Act was to be construed in Gibraltar as if it had not been repealed in the United Kingdom. In other words the Imperial copyright area remained intact as far as the law of Gibraltar was

[5] Copyright Act, 1911, s. 1.
[6] "Country" is defined by s. 48 (1) of the Act to include "Any territory."
[7] The Copyright Act, 1956 (Commencement) Order, 1957 (S.I. 1957, No. 863).
[8] The Copyright (Gibraltar) Order, 1960 (S.I. 1960, No. 847).

concerned.[9] Thus paragraph 41 is seen as the corollary to section 31, its purpose being to bridge the gap between the replacement of the 1911 Act in the law of the United Kingdom and its replacement in the law of a colony or other dependent territory. Since the 1956 Act contains no machinery for the replacement of the 1911 Act in the law of a self-governing dominion, it follows that paragraph 41 is not intended to apply to such a dominion. This conclusion is reached without recourse to section 4 of the Statute of Westminster, but, if any doubt is thought to remain, the provisions of that section, even if taken at their lowest as laying down a mere rule of construction, are surely conclusive. Parliament must be taken always to have them in mind in enacting legislation, and an intention to override them could not be imputed unless expressed in terms admitting of no ambiguity. Such terms are not to be found in the 1956 Act and, as Menzies J. observed in the *E.M.I.* (*Australia*) case,[10] " to treat it as altering the law in Australia would be to attribute an impossible intention to the Imperial Parliament."

It was not suggested by any of the judges that because paragraph 41 refers to " any country other than the United Kingdom " and Australia is such a country the paragraph was therefore intended to apply to Australia. Apart from doing violence to the scheme of the Act, as explained above, such a suggestion would show a misunderstanding of the way statutes are drafted, which is within the context of existing law (including rules of construction) and constitutional conventions. Just as the draftsman writes " he " in the knowledge that this will not be taken to override the provisions of the Interpretation Act, 1889, which require words of masculine gender to be construed as including the feminine and words in the singular as including the plural; just as he writes " any person " without fearing that this will be taken to include a Russian in Russia (or even an Australian in Australia), so he writes " any country " without wondering if someone will assume that Parliament is thereby intending to commit a grave breach of constitutional convention and to override what is at the very least a categorical rule of construction, a rule which existed even before the Statute of Westminster was passed. As Dixon C.J. remarked [11] of a suggestion that an Act passed in 1928 was intended to apply to Australia without the concurrence of that dominion: " Every presumption of construction was against such an intention." McTiernan J. also refers to this " rule of construction." [12]

Nevertheless Professor Gray commits himself to the statement [13] that paragraph 41 " was clearly intended to apply to Australia,

9 The diligent reader may ask: what about the protection given in another colony for a work first published in Gibraltar if the 1911 Act remained in force in the other colony after it had been repealed in Gibraltar? The answer is that para. 41 has been extended to meet this case: see the Copyright Act, 1956 (Transitional Extension) Order, 1959 (S.I. 1959, No. 103).

10 At p. 315.

11 At p. 309.

12 p. 310.

13 At p. 651 of his article.

but, in the absence of the recital required by section 4 of the Statute of Westminster, it was a mere nullity." The *E.M.I.* (*Australia*) case is the sole authority given for this proposition but in none of the judgments, not even in the dissenting judgment of Menzies J., is there any suggestion that the British Parliament intended by paragraph 41 to alter the law of Australia in disregard of section 4 of the Statute of Westminster. In fact the judges paid little attention to the point. Dixon C.J., in what may with respect be described as something of an understatement, said in passing: " It may be remarked that perhaps in view of section 4 of the Statute of Westminster this provision [*sc.* paragraph 41] does not operate in point of law in Australia," while the view of Menzies J. has been mentioned above. The other two judges did not think it necessary to mention the point.[14] Furthermore it is beyond question that none of the judges intended to pronounce upon the controversy over the meaning of section 4 of the Statute of Westminster. Far from discussing the two possible views and adopting one or other of them, the two judges who mentioned the matter treated the meaning of section 4 as not in dispute.

It is submitted that the case is simply an illustration of the fact that the wording of section 4, even treating it as a rule of construction only, is so strong that legislation of the United Kingdom Parliament which does not embody the declaration mentioned in section 4 could never be taken as intended to apply to a self-governing dominion unless *no other construction were possible*. If paragraph 41 had referred to " any country (including any self-governing dominion) . . ." or if Professor Gray had been right in his statement that the paragraph was " a mere nullity " if it did not apply to the self-governing dominions, then the matter would have been very different and the decision in the *E.M.I.* (*Australia*) case would have indeed been a constitutional landmark.

If the foregoing treatment is accepted as correct it follows that, except for the first, Professor Gray's five points [15] are not, as he claims, established by the *E.M.I.* (*Australia*) case and must wait for verification until the unlikely event of legislation being passed by the United Kingdom Parliament which expressly alters the law of Australia or some other self-governing dominion without including the declaration required by section 4 of the Statute of Westminster.

Meanwhile a concluding word might be said about the copyright

[14] The true effect of paragraph 41 does not seem to have been brought out in argument, and indeed it has been widely misunderstood. Menzies J. appears to treat it (at p. 315) as a saving which prevents the 1911 Act from being repealed in a country outside the United Kingdom. In this view he is joined by Professor Gray (at p. 650) and the editor of the latest edition of *Copinger on Copyright* (9th ed., p. 426). The latter work has some strange views on the effect of para. 41. On p. 371 it is stated that it applies to the self-governing dominions, while on p. 428 it is stated to operate in New Zealand, where the 1911 Act was never in force.

[15] pp. 650–652.

law of Australia. Although the 1956 Act did not alter this law, it clearly altered the *effect* of it. It did this by removing the United Kingdom and various dependent territories from the Imperial copyright area. If, as appears to be the case,[16] no Australian law equivalent to paragraph 41 has been passed it would seem that works previously protected in Australia by reason of first publication in the United Kingdom, or in a dependent territory to which the 1956 Act has been extended, have lost that protection. The same appears also to be true of similar works previously protected in the Union of South Africa.

F. A. R. BENNION.*

16 I am writing from Ghana and relying on *Copyright Laws and Treaties of the World.*

* Of the Middle Temple, Barrister-at-Law.

# REPORTS OF COMMITTEES

## Report of the Interdepartmental Committee on the Business of the Criminal Courts [1]

By and large, the recommendations of the Streatfeild Committee on the Business of the Criminal Courts were well received in the national press, being taken as a common-sense solution to certain practical problems of pressing urgency in the criminal courts, and as a sign that modern penological thinking had at least penetrated the Committee's precincts and might henceforth be treated with more respect in the courts. How far these general impressions were correct is the question we will try to answer in this review.

This Committee was set up in June 1958, charged with reviewing "the present arrangements in England and Wales (a) for bringing to trial persons charged with criminal offences and (b) for providing the courts with the information necessary to enable them to select the most appropriate treatment for offenders," and they were enjoined to consider what changes were required in these arrangements, "having regard to the desirability of ensuring that cases are brought before the courts and disposed of expeditiously."

The Committee was a small one, consisting of nine persons; among them, in addition to the legal representatives, were a distinguished psychiatrist and a professor of social psychology as well as the well-known sociologist the Baroness Wootton of Abinger, and, we may add, the former head of the Law Department of the London School of Economics. It is clear from the Report that the Committee benefited greatly not only from the tremendous volume of evidence received from most varied sources but also from its own distinguished and somewhat broad membership. We have for too long been content perhaps to consider matters of law reform only with committees of lawyers. The Home Office is to be congratulated on the results of the somewhat more widely constituted membership of this Committee. It is clear, moreover, that a certain amount of rethinking has been accomplished about the whole process of sentencing, and it is hoped that the lessons to be learned from this Report will not be lost on the courts and the administration.

### *Arrangements for bringing Accused Persons to Trial*

Part A of the Report discusses the difficulties which have arisen in ensuring the speedy trial of offenders in the superior courts, and the delays which have occurred in recent years due to the pressure

[1] (The Streatfeild Committee): Cmnd. 1289, February 1961.

of numbers of cases for trial and other problems. "The machinery of the superior courts," we are now authoritatively informed, "is not only turning too slowly; even at its present rate of rotation, it is creaking under the strain which is being put on it." [2] This was one of the main reasons why the Committee was set up. This pressure of business is felt at all levels of the system of criminal courts, at the assizes, at quarter sessions and in the magistrates' courts, but by its terms of reference the Committee was not asked to deal with delays in the magistrates' courts. This meant that it could do no more than record the existence of a body of opinion to the effect that the present procedure in committal proceedings in the magistrates' courts is outmoded. There is a case for this procedure to be reviewed.

### *The Delays Pending Trial*

The extent to which delays occur in cases after committal and before trial takes place had never been precisely measured before, but the Home Office Research Unit prepared for the use of the Committee a most valuable document called *Time Spent Awaiting Trial*, which has been separately published by H.M.S.O., and which gives the results of a piece of research into the time spent awaiting trial and sentence. This showed pretty convincingly that there were no grounds for complacency: although the figures might be better than those for almost any other country (and the Committee thought this likely, though no evidence is referred to on this point; I suppose this is common knowledge), the Committee formed the opinion that there was considerable room for improvement: "the situation which they (the figures) reveal cannot be regarded as satisfactory in modern conditions." As many as 5,000 cases a year (nearly a quarter of the total) take longer than eight weeks to get to the trial, and "it seems indefensible that 1,600 wait for longer than twelve weeks and that 400 of the 1,600 wait for longer than sixteen weeks." There are strong reasons why the waiting time should be reduced to the practicable minimum, and the Committee accepts as the desirable aim a waiting period of not more than eight weeks. It should be emphasised that this waiting period excludes the time spent between the commencement of the proceedings and the committal for trial, so that between two and three weeks on average must be added to this waiting period to get a measure of the total period of delay.[3]

### *The Remedies*

The Committee, having set its sights, proceeds to battle. The remedies considered fall into two main groups, (1) jurisdictional

[2] p. 13.

[3] The figure of between two and three weeks is the Home Office Research Unit's figure; in 90 per cent. of the cases this interval was less than four weeks.

changes, (2) the reorganisation of the superior courts of criminal jurisdiction.

(1) *Jurisdictional changes*

The major recommendation here is that certain breaking and entering offences done with a view to stealing shall henceforth be triable summarily with the consent of the accused. These would include all breaking and entering into shops and warehouses, etc., but would exclude breaking and entering dwelling-houses. In other words, henceforth only burglars and housebreakers who really do break and enter, or attempt to break and enter, dwelling-houses will be sent for trial. The rest (the majority) will be tried summarily if the accused consents. One limitation, which seems a fair one, is that this will in no way affect cases of breaking and entering with a view to the commission of some other felony which is not triable summarily. Larceny, of course, is triable summarily. Thus a person who breaks and enters with a view to some crime such as arson will not be able to be dealt with summarily.

Then there are a number of minor extensions of the jurisdiction of the magistrates' courts to try indictable offences. Individually, they do not amount to a great number of cases. Collectively, and with the breaking and entering cases included, they could well increase the burden on the magistrates' courts considerably. It is observed, however, that some time will be saved by the removal of the necessity for the time-consuming committal stage in these cases. An enlargement is also proposed in the concurrent jurisdiction of quarter sessions and assizes, which is justified in view of the fact that all quarter sessions now have legally qualified chairmen. No change is recommended in the direction of transferring large numbers of offences out of the jurisdiction of assizes, however, although various suggestions were carefully considered. Nor is any amendment proposed to the long-standing principle that a person who is charged with a summary offence which is punishable with more than three months' imprisonment can claim a right to be tried by jury. The Committee felt there were insufficient grounds to justify any departure from this principle, even in relation to motorists and charges of driving dangerously and driving under the influence. The Committee's attitude seems to be one of cautious change on a limited front.

The expected improvements in the case load of assizes and quarter sessions would be considerable, though the former may be offset by another of the Committee's recommendations, *viz.*, that long and difficult cases should more often be referred to assizes. Quarter sessions would achieve an overall reduction of 15 per cent. in their case load, according to the estimate.

(2) *The reorganisation of the superior courts of criminal jurisdiction*

This is approached from two angles. First, the proposal to

extend the system of the Crown Courts is carefully considered, the pros and cons are weighed, and the Committee come down against the idea of any system of full-time criminal courts staffed with full-time criminal judges. The experiments in South Lancashire seem likely to remain unique, but is this not somewhat disappointing, to say the least? The arguments against, in terms of the danger of staleness, the judge developing local antipathies, and becoming prosecution-minded, are none of them insuperable or entirely convincing, it seems to me. Only the most cursory reference is made to any other possible system of continuous criminal courts, and this when all the statistical evidence shows that from the point of view of avoiding delays the continuous courts have a far better record, as might be expected. Would it not have been possible to combine quarter sessions in circuits with a continuously sitting court somewhere on the circuit, even if we must give up the idea of continuously sitting judges? The answer based on accommodation problems and other administrative difficulties does not impress me, at any rate taking a long-term view of the possibilities, and it is questionable whether the short-term remedies proposed for quarter sessions will prove either practicable or efficient. All we are told on this subject leaves us thoroughly unconvinced, I fear.

The second reorganisation considered is a twofold amendment of the assize and quarter sessions sittings. Assize judges will be able to achieve more concentration of their efforts in certain places, by the use of special judge-itineraries, which will leap the circuit boundaries to adjacent assize towns in certain cases, while in the latter part of September there will be a " flying-squad " of three judges ready and willing to hold supplementary assizes wherever there may be a pressing need. The vision of assize judges arriving at Exeter hotfoot from Durham conjures up the notion of courts of pie-powder in a new form. Whose feet will be dusty? one might well ask. This proposal is unlikely to be very welcome to the legal profession, but to avoid a sixteen weeks' delay it seems we must be prepared to go to almost any lengths. I can think of graver injustices which might be remedied first.

Quarter sessions are to be left to make their own arrangements for ensuring that too much delay does not occur before trial, under the Lord Chancellor's stimulus and supervision. One reform proposed is that they should become legally continuous courts, and cease to be known as Quarter Sessions, but be called simply Sessions (*cf.* London Sessions). Appeal committees are to be abolished, with safeguards in the case of appeals from juvenile courts. Two kinds of sittings will be held, fixed and special sittings, the latter to be employed wherever necessary to deal with cases delayed or adjourned. Much more use will be made of the present " convenient court procedure " to enable courts to commit to adjacent courts to avoid delay. The remuneration of recorders and their

assistants will be worked out on a national basis, with the Lord Chancellor's approval of local scales. Much more use will be made of deputy and assistant recorders.

All this, or much of it, sounds quite satisfactory. The only hesitation is in the degree to which it is wise or indeed feasible to thrash this matter out on a local or regional basis, albeit with the Lord Chancellor as headmaster. Timetables are notoriously sticky subjects to handle, and when local prestige and personal convenience are thrown into the argument, goodness knows what may emerge, if anything. Is it not time to take the whole system and perform a surgical operation rather than a little local massage? Is it not necessary to combine county and borough sessions on an area basis in new circuits, and ensure that there are continuously sitting courts not too far apart? Can this be achieved by the method proposed? I would like to think so, but I am by no means sure.

In the debate on the Address in the House of Commons in October 1958, Mr. Butler referred to the difficulty of altering a system such as the assize system which is of such antiquity, dating from the reign of Henry II, and which is so much hallowed by tradition.

> " I have myself ventured to look at it, for a cat may look at Henry II, but I do not at present, subject to further consideration, see any immediate prospect of altering so fundamental a feature of our justice."

The Streatfeild cat has now been let out of the bag, and turns out to be, on the matter of reorganisation of the courts, a tame and somewhat over-circumspect animal. Let us hope, for the sake of the untried criminals in the dark holes of our prisons, that this is not so.

*Arrangements for Informing Courts with a view to Sentencing*

Part B of the Report deals with the arrangements for providing the courts with the information they need in order to enable them to select the most appropriate treatment of offenders. This is the most interesting part of the Report to criminologists and probation officers, prison medical officers, governors and the like. It is of tremendous importance to the courts themselves that they should be adequately informed at the sentencing stage, and should be assisted in making the right choice of sentence.

The subject, like that of the system of courts, has not been systematically examined in any previous inquiry in this country, and the Committee had little to go on in the way of guidance. They found it necessary to review with some care the aims of the sentencing of offenders, and in a most lucid fashion they show how the old " tariff system " has been giving way gradually to the needs of the offender, and how difficult it is for sentencers (a term used throughout this part of the Report as a form of

shorthand which is convenient if somewhat unfamiliar) to make appropriate choices in face of the competing claims in particular cases.

If sentencing has become a more complex task, and the multiplication of available choices has added to this complexity, then, the Committee argue, it is incumbent upon our society to provide the best possible assistance to the courts in discharging this delicate, dangerous and very difficult duty. There are gaps in our knowledge which are being or can be filled by research, and the results of this research must be fed back to the courts in a form which they can understand and use. A booklet could be produced by the Home Office for the guidance of courts and others concerned with the sentencing process.

The information available to the courts at the sentencing stage is normally supplied in the way of reports by probation officers, prison governors, prison medical officers and the police. There is much duplication here, and recommendations are made to reduce it. Moreover, it is recommended that these reports should normally be made available at the time of conviction, and this means that the Committee favour pre-trial inquiries with the consent of the accused. The arguments against this practice are not considered to outweigh the advantages of having the reports readily available, and avoiding further delay after conviction and prior to sentence so that the necessary inquiries can be made. Of course, in a small proportion of cases, there will have to be a remand for inquiries and the offender will have to come up for sentence later. The Report gives approval to the cautious expression of opinion by probation officers and prison officials based on their own experience, about the best ways of dealing with particular offenders on whom they have to report. The courts should welcome such advice, rather than resent it, which has unfortunately been the experience in some cases in the past. All this is very encouraging and rather progressive in its sympathetic tone and will be hardly necessary to those who are willing to follow the advice but a useful weapon in the hands of those who encounter resistance. There is therefore more to be said in praise of Part B of the Report than of Part A, but perhaps even that Part may be regarded as a necessary instalment on the way to what *The Times* described as modernised justice.

J. E. Hall Williams.

# NOTES OF CASES

## The Rule in Armitage *v.* Attorney-General [1] and Foreign Nullity Decrees

It is stated as follows in Dicey's *Conflict of Laws*: "On the analogy of the rule in divorce [*sc.* that in *Armitage* v. *Att.-Gen.*[2]], we may assume that English courts will recognise a decree of nullity made by the courts of the country where the parties are not domiciled if that decree would be held valid by the court of their common domicile." [3] It seems incredible that we should have had to wait until 1961 in order to witness judicial acceptance of this assumption. *Abate* v. *Abate* (*otherwise Cauvin*) [4] is thus something of a landmark in the history of recognition of foreign decrees in matrimonial causes. It is, in fact (apart from the *Armitage* case itself), only the second reported case in England in which the *Armitage* doctrine has been successfully applied so as to accord recognition to a non-domiciliary decree.[5]

The facts of the case were as follows: the husband, an Italian national domiciled in Italy, married in 1952 at the church of St. James's, Spanish Place, London, a domiciled Englishwoman. The parties did not cohabit in England, but went to live in Italy. Although the marriage was never consummated, a child was born in 1953 as a result of *fecundatio ab extra*.[6] Soon after this the marriage broke down and the parties began to live apart. In 1959, the husband had his name removed from the population register of the Italian commune in which he resided and obtained the inclusion of his name in that of Castaneda, in the Canton of the Grisons, Switzerland. His wife was already resident in Castaneda. He then instituted in the appropriate court of the Canton a suit

1 [1906] P. 135.
2 *Supra.*
3 7th ed., 1958, at p. 383.
4 [1961] 2 W.L.R. 221; [1961] 1 All E.R. 569.
5 *Clark* v. *Clark* (1921) 37 T.L.R. 815, a divorce case, is the first. *Cf. Cass* v. *Cass* (1910) 26 T.L.R. 305, where the rule was applied so as to negative recognition of a non-domiciliary decree of divorce. Several decisions not in fact turning on the application of the rule nevertheless pay lip-service to it: see, *e.g.*, *Travers* v. *Holley* [1953] P. 246 (C.A.); *Gatty* v. *Att.-Gen.* [1951] P. 444; *Mountbatten* v. *Mountbatten* [1959] P. 43; *Perin* v. *Perin*, 1950 S.L.T. 51. In *Di Rollo* v. *Di Rollo*, 1959 S.L.T. 278, the Scots court seems to have let slip a golden opportunity to apply the rule so as to accord recognition to a non-domiciliary decree recognised in the husband's domicile.
6 See, for a similar situation, *Clarke* v. *Clarke* [1943] 2 All E.R. 540. Had the present case been one in which the husband had actually asked for a nullity decree, s. 2 (1) of the Matrimonial Proceedings (Children) Act, 1958, would have applied. *Quaere*, do these provisions apply to actions for a declaration of status? If, as is very likely the case, they do not, is there not a lacuna in our law here?

for the annulment of his marriage on the ground of his own impotence. Jurisdiction was assumed on the footing that the petitioner was, in the Swiss sense of the term, domiciled within the jurisdiction. Both parties were legally represented and the wife supported the petition. In 1960, the court granted a decree of nullity. Later the husband returned to England to reside and sought a declaration that the Swiss decree was effective in England. The petition was undefended. Presumably Lloyd-Jones J. felt able to take jurisdiction because the marriage had been celebrated in England, for nothing is said on this matter.[7]

Expert evidence showed that Italian courts would accord recognition to the Swiss decree. Although the "reason why"[8] this was so (as opposed to the fact that it was so) is not relevant for the English court, it may be mentioned that the decree complied with the conditions laid down in a Convention of January 3, 1933, between Italy and Switzerland, concerning reciprocal recognition of judicial decisions in matters of civil law. Three submissions were made as to why recognition should be accorded to the decree in England. First, if the husband had acquired a domicile of choice in the Grisons, the decree should be recognised inasmuch as it would be a domiciliary decree. This argument was not pursued as it was clear that, in the eyes of English law, he had never acquired such a domicile. Second, that if the husband was domiciled in Italy and the Italian courts would recognise the Swiss decree, then, upon analogy with the *Armitage*[9] rule, the decree was entitled to recognition in England. Third, that since English courts have in the past themselves assumed nullity jurisdiction on the ground of the parties' common residence in England,[10] they ought, on a reciprocal basis, to recognise a nullity decree given by a foreign court within whose jurisdiction both parties were resident.[11]

Lloyd-Jones J. regarded the marriage as voidable.[12] Whether

7 *Ross Smith* v. *Ross Smith* [1961] 2 W.L.R. 61 (C.A.) is justification for assumption of jurisdiction if, as Hodson L.J. insists in *Har-Shefi* v. *Har-Shefi (No. 1)* [1953] P. 172 (C.A.) at p. 174, "questions of jurisdiction in such cases as this should be decided on the same principles of jurisdiction in nullity." *Cf.* Dicey, *op. cit.*, *supra*, at pp. 357–358.

8 See Tuck (1947) 25 Can.Bar Rev. 226, esp. at pp. 233–234. The case under review would seem not to attract the strictures of Morris as propounded in (1946) 24 Can.Bar Rev. 73.

9 *Supra.*

10 *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115 (C.A.), not, as stated in the report (see at p. 223), *De Reneville* v. *De Reneville* [1948] P. 100, is authority for this.

11 *Travers* v. *Holley* (*supra*); *Corbett* v. *Corbett* [1957] 1 All E.R. 621, is also relevant here for, although the facts differed in that the parties may not have both been resident in Palestine at the date of the nullity proceedings there, Barnard J. clearly took the view that English courts should concede to the courts of a foreign country a nullity jurisdiction analogous to that of the English courts.

12 At p. 223 he says that "the husband, *and therefore the wife*, was domiciled in Italy at all material times."

he did so because it was so by the *lex loci celebrationis* and the *lex fori* (both English law) or whether he adopted the classification of Italian or Swiss law it is not possible to say. No proof of the foreign law on this point appears to have been before him. He was content to grant the declaration prayed for upon the basis of the second submission, adding that the textbooks warranted the application of the *Armitage* rule [13] to nullity. He thus did not concern himself with the third submission and may accordingly be said to have preferred the " indirect " approach to the more " direct " one available to him. Having regard solely to the history of nullity jurisdiction in England, one might have possibly expected to see the third argument preferred to the second. At the same time, however, our courts may well have to grapple one day with the problem of recognising or not recognising a decree granted by a foreign court within whose jurisdiction the parties resided but not regarded as valid in their domicile.[14]

*Abate* v. *Abate*,[15] very fortunately perhaps, did not give rise to many difficulties. The marriage, being regarded as voidable, thus conferred on the wife the domicile of the husband: hence, as in the *Armitage* [16] case itself, the parties' domicile was " common." There was thus no question as to whether the rule could apply when the domicile was not common because the marriage was void. Nor had it to be decided by what law one would discover whether the wife was entitled to acquire a domicile separate from that of her husband. Nor, equally fortunately, had it to be decided what was to be the attitude, assuming the wife and husband to have different domiciles by virtue of a void marriage, if the domiciliary law of one of them recognised the non-domiciliary decree and that of the other did not. Unless, therefore, the extension of the *Armitage* [17] rule to cover nullity is to be confined to cases where both parties have a common domicile,[18] problems more for the delight of the mathematician than of the lawyer are likely to present themselves for solution.

P. R. H. Webb.

## Oppressive Conduct of Company's Affairs

The decision of the Eastern Cape Division of the South African Supreme Court in *Benjamin* v. *Elysium Investments (Pty) Ltd.*[1] should be of interest to company lawyers in England and other

[13] *Supra*. He cited Dicey, *op. cit.*, *supra*, at p. 383; Rayden *on Divorce*, 8th ed., p. 824, and Jackson *on the Formation and Annulment of Marriage*, p. 281.

[14] By analogy with the *Mountbatten* case (*supra*), it might be argued that the view of the domicile should prevail.

[15] *Supra*.

[16] *Supra*.

[17] *Supra*.

[18] There may be a common domicile when the marriage is void, as in *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641 (H.L.).

[1] 1960 (3) S.A. 467 (E.C.D.).

jurisdictions where the equivalent of section 210 of the Companies Act has been introduced.

The relevant facts of the case were as follows: one B was the sole beneficial shareholder in a building construction company known as A.B. Construction Company. In 1956 an agreement was concluded between B and Elysium Investments Company by which the former purchased from the latter, at a price of 10s. per share, 2,550 ordinary shares of nominal value £1 each. The only other shareholder in this company was H who likewise held 2,550 ordinary shares, B and H being the sole directors of the Elysium Company. The purpose of the agreement was that the construction company should erect a building for the Elysium Company on land owned by the latter, and it was hoped that by this means a saving of approximately 17 per cent. on the building costs would be effected.

After a number of alterations in the construction plans, and at a time when the building was nearing completion, serious disputes broke out between B and H on the subject of the cost of the undertaking. Relations between the two directors rapidly deteriorated and culminated in the presentation of a claim by the construction company for payment of an amount of £3,500, said to be the balance of the sum payable by the Elysium Company under the building contract. It was at this point that the equal distribution of shares began to make itself felt: the directors became bitterly opposed to one another and, since neither had the voting control necessary to coerce the other, deadlock ensued. These unfortunate differences reached their climax when the construction company issued a writ for the amount alleged to be owing and at a directors' meeting (attended, as is fashionable on these occasions, by the attorneys of each party) B refused to support a resolution proposed by H that the action be defended.

Eventually, in 1959 B lodged with the court a petition in which he alleged that in terms of the equivalent of section 222 (*f*) it was just and equitable that the Elysium Company should be wound up. In his answering affidavit and in the course of argument, counsel for H conceded that the deadlock was such as to afford grounds for a winding-up order in accordance with the principle laid down in *Re Yenidje Tobacco Co. Ltd.*[2] but claimed that such an order would unfairly prejudice him. He therefore petitioned the court for an order in terms of section 210, alleging that the affairs of Elysium Company were being conducted in a manner oppressive to him and asking that B be ordered to sell to him the former's shareholding in the company at a price to be determined by an independent chartered accountant. Argument was heard upon the issues of law raised by these conflicting claims.

After disposing of an objection to the form of H's claim, O'Hagan J. turned his attention to the main argument, *viz.*, that

2 [1916] 2 Ch. 426.

relief under section 210 is not available where control of the company's affairs is not vested in the person who is alleged to have acted oppressively, *i.e.*, that the section " can be invoked by an oppressed minority, but not by a member who shares the control equally with another." The learned judge examined the origins of the relevant section, which was introduced into South African company law from the United Kingdom Act in 1952, and also considered certain observations of Viscount Simonds in *Scottish Wholesale Co-operative Society* v. *Meyer*,[3] and of Jenkins L.J., as he then was, in *Re Harmer*.[4] In the latter case the learned Lord Justice had approved a passage in the judgment of Roxburgh J., in which the following statement appeared: " I think the point about the word ' minorities ' is that it is only where the voting control is elsewhere that a case for the application of the section arises." O'Hagan J. was, however, of opinion that these dicta should be read in the light of the facts of those cases, in both of which the oppression *was* of the minority shareholders, and that the relevant section could not be read so as to limit it in the manner suggested: in particular, neither the authorities nor the wording of the section itself restricted its operation to oppressive conduct only by a member vested with power to override a minority vote. In short, it was the view of the learned judge that " the remedy is open to a shareholder who does not possess the power of control." [5]

It is submitted that the conclusion of O'Hagan J. is certainly correct. The question is whether the United Kingdom Act can be interpreted to the same effect: section 210 and the equivalent section 111*bis* of the South African statute are, so far as material, in identical terms, with the slight difference that printed above section 210 there appears in italics the single word " minorities." [6] In view of the fact, however, that the meaning of the section is itself clear, it is difficult to imagine that the presence of this word can make any difference since it is well established that at most the heading in a statute can be permitted to assist the interpretation only when the section itself is ambiguous [7] which is certainly not true of the present case.[8] Indeed, it would be surprising to find that the rights of an oppressed minority are better protected than those of an impotent " equality."

The problem in such cases will almost certainly be that of proof that there has been " conduct " which is " oppressive " to some

[3] [1959] A.C. 324 at 339.
[4] [1958] 3 All E.R. 689 at p. 705.
[5] *Ibid.* at p. 477.
[6] The absence of this word in the S. African Act may be due to the fact that s. 111*bis* was added by way of amendment and not in the process of a consolidation.
[7] See, *e.g.*, *R.* v. *Hare* [1934] 1 K.B. 354.
[8] Roxburgh J. takes this view of the section in the passage from his judgment cited in *Re Harmer* [1958] 3 All E.R. at p. 705. See also Gower, *Modern Company Law* at p. 542.

part of the members of a company in which both oppressors and oppressed would appear to possess an equal power to inflict and to resist such burdens. O'Hagan J. in the instant case found the alleged oppression proved [9] and it may be that the wide meaning attached to both these terms in the *Scottish Wholesale* case will encourage a liberal approach on future occasions.

A further question considered by the judge in *Benjamin's* case was whether the court should, as requested, delegate the function of assessing the value of the shares to another. O'Hagan J. declined to order such enforced arbitration in the absence of agreement between the parties, and preferred to follow the procedure of the court in the *Scottish Wholesale* case in undertaking this duty himself. In the result, and subject to various undertakings by H, B was ordered to transfer his shareholdings to H at the " fair value " determined by the judge.

*Benjamin* v. *Elysium Investments* indicates once more the uses to which this valuable new remedy may be put and also illustrates how, under its influence, the courts may go far towards relinquishing their formerly disinterested attitude towards the internal affairs of companies. It is interesting to speculate as to what H's remedies would have been had section 210 not been available: by refusing to allow the company to defend the action against it, B was probably guilty of a breach of his fiduciary duty. Although according to *Foss* v. *Harbottle* the proper plaintiff in such a case would be the company, H might well be able to bring himself within the exception to that rule since, as has been remarked by Harman J. (in a case in which the shareholdings were very nearly evenly divided), where the wrongdoer " is in a position to prevent the company taking any action against him . . . an action might lie at the suit of the minority or of a frustrated shareholder " for the benefit of the company.[10] Since the fraud in such cases is in reality a wrong done to the company, there seems to be no good reason why the " equality," any more than the " minority," should not be permitted to bring action in respect of it.

B. H. McPherson.

## Polygamy by Estoppel

The question which Phillimore J. had to decide in *Hayward* v. *Hayward* [1] was whether a man was debarred from obtaining a decree of nullity of a bigamous marriage by the fact that he had, in previous proceedings before magistrates, admitted desertion from the alleged wife. The decision that he was not so debarred by estoppel was reached only after the proceedings at assizes had

[9] Unfortunately the report does not deal with this question: see p. 477.
[10] *Birch* v. *Sullivan* [1958] 1 All E.R. 56 at p. 58.
[1] [1961] 1 All E.R. 236.

been adjourned for argument by the Queen's Proctor under section 10 of the Matrimonial Causes Act, 1950, and the result suggests that more ample use might be made of this machinery for ensuring adequate consideration of important points of law and procedure (including evidence) relating to matrimonial causes.

The argument that in such circumstances the man was estopped from challenging the validity of an admittedly bigamous marriage after his first wife had been proved to be still alive was based on the alternative grounds of estoppel *per rem judicatam* and estoppel by conduct (or *in pais*, as it is referred to throughout the report). Phillimore J. had no difficulty in disposing of estoppel *per rem judicatam*, as no decision of the magistrates' court could bind the High Court. But the question of estoppel by conduct was complicated by three previous decisions, one at least of which in fact concerned estoppel *per rem judicatam*.

The first of the three was the case of *Wilkins* v. *Wilkins*.[2] There a woman petitioned for judicial separation because of her husband's adultery; the alleged husband in reply denied not only the adultery, but also the validity of his marriage to her, on the grounds that at the time of the ceremony between them the woman's lawful husband was still living. The jury found that the alleged husband had committed adultery and that the marriage was valid because at the time it was celebrated the woman's former husband was dead. Doubt having been cast on the correctness of this finding by the reappearance of the former husband a few months later, the Court of Appeal allowed the " second husband " to appeal out of time for a new trial, on his undertaking to secure maintenance of £1 per week for the woman concerned during their joint lives. In imposing this condition the court was admittedly swayed by the fact that the woman was sixty-four years of age, and that the bigamous " second " marriage had produced eight children in contrast with the lawful first marriage of which there was none[3]; the pleadings, on the other hand, were largely concerned with technical questions of statutory limitations of time for applications for a new trial. A decision that, in the light of fresh evidence, the time allowed for applying for a new trial should be extended, seems (as Phillimore J. suggested) a curious foundation for a line of decisions on estoppel. In fact the word " estoppel " appears in only one of the three judgments delivered, when Kay L.J. declared[4] that " as evidence is now forthcoming which could not by the exercise of reasonable diligence have been obtained at the trial, there must be some means of getting over an estoppel arising from a verdict which was obtained under a misapprehension of the real facts." Lindley L.J.

[2] [1896] P. 108.

[3] *Ibid.*, *per* Lindley L.J. at p. 113, *per* Lopes L.J. at p. 114 and *per* Kay L.J. at p. 115.

[4] *Ibid.* at p. 114.

was content to speak [5] of " getting rid of the difficulty which is created by the verdict," and Lopes L.J. said even less precisely [5] that " under the very peculiar circumstances of the present case, the enlargement [6] ought to be granted."

Nevertheless, in the subsequent case of *Woodland* v. *Woodland*,[7] Hill J. cited the passage from the judgment of Kay L.J. quoted above as showing that in *Wilkins* v. *Wilkins* " the estoppel was clearly recognised," [8] and on that authority he held that a man was estopped from petitioning for a decree of nullity on grounds of bigamy because he had previously failed to defend a suit brought by the apparent wife for restitution of conjugal rights. It appears to have been accepted that, at the time she went through a ceremony of marriage with the petitioner in 1914, a competent French court had pronounced a preliminary decree of divorce between the woman concerned and her former husband, but that because of non-compliance with technical requirements, no final decree dissolving that former marriage was in force at the time of the second ceremony. Seven years after the second ceremony the woman obtained an order for restitution of conjugal rights against the " second husband " in proceedings which he did not defend. Hill J. held that the grant of a decree for restitution of conjugal rights involved a prior finding of a previously valid marriage, and that since the alleged husband had not defended the suit, he could not subsequently attack the validity of the marriage which the court had already decided to be genuine even though: " It may be—and I think it is the fact—that at that time he had not ascertained that there was any ground for disputing the validity of the marriage." [9] Presumably if the " second husband " had defended the suit he might have been able, on the authority of *Wilkins* v. *Wilkins*, and on the production of such fresh evidence, to appeal out of time against the court's finding that the marriage was valid, although where bigamy is alleged the discovery of a possible technical flaw in previous divorce proceedings can hardly compete for cogency with the production alive of a former spouse whom a jury has found to be dead.

The last authority running counter to the decision in *Hayward* v. *Hayward* was *Bullock* v. *Bullock*.[10] There, in reply to a complaint of desertion brought before magistrates in 1959 by his apparent wife, a man replied that their marriage in 1944 had been bigamous and void because the woman was at that time married to another. The woman had married her first husband in 1921; he deserted her in 1926, and in 1929 she obtained a maintenance

[5] *Ibid.* at p. 113.
[6] Of time.
[7] [1928] P. 169.
[8] *Ibid.* at p. 174. *Cf.* Phillimore J., *contra*, in [1961] 1 All E.R. at pp. 239 and 240.
[9] *Ibid.* at p. 172.
[10] [1960] 2 All E.R. 307; 1 W.L.R. 975.

order for herself and the two children, under which a few payments were made. Apart from these the wife neither saw nor heard of her husband after he left her in 1926, and she made no further inquiries. It subsequently transpired that, arrears having accumulated under the maintenance order, a committal order was made in 1930 and a warrant issued, but it could not be executed because the police could not trace the husband. When she went through a ceremony of marriage with a second man in 1944 the woman described herself as the widow of her former husband, but the " second husband " was fully informed of the circumstances of the first husband's disappearance, and in these circumstances the Divisional Court held that the magistrates had rightly inferred in 1959 that the first husband, who had not been seen since 1929, was dead before the second marriage ceremony took place in 1944, sixteen years after his original disappearance. Lord Merriman P. added [11]: " It is not in my opinion the law that there can be no estoppel where the marriage is void because of bigamy," and cited *Wilkins* v. *Wilkins* and *Woodland* v. *Woodland* as authorities to this effect. One particular in which *Bullock* v. *Bullock* differed from *Wilkins* v. *Wilkins* [12] was the rather relevant fact that there was no evidence, even by 1959, that the husband who had disappeared in 1926 and could not be traced in 1930 was alive in 1944. Moreover, in *Bullock* v. *Bullock* there was no estoppel *per rem judicatam*, as in *Woodland* v. *Woodland* [13] (and possibly *Wilkins* v. *Wilkins*).

In *Hayward* v. *Hayward*,[14] Phillimore J. preferred to revert to an old line of authority established in the ecclesiastical courts [15] and exemplified by *Miles* v. *Chilton* [16] and *Andrews* v. *Ross*,[17] according to which the court would, in nullity suits, inquire into the facts irrespective of estoppel. He expressly dissented from the statement by Hill J.[18] that there was nothing in the law peculiar to the Divorce Division which rendered inapplicable the general law of estoppel. Phillimore J.'s conclusion seems preferable,[19] namely that " it would be contrary to all principle if a ceremony which is by definition null and void could be converted into something valid and binding and capable of conferring status by the act or inaction of a party to it. It would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth, namely, that a marriage is bigamous . . . merely because one or both of them has chosen to assert its validity or because one of them has failed to dispute or has concurred in the assertion of its

[11] *Ibid.* at 2 All E.R. at p. 309.
[12] *Supra*, note 2.
[13] *Supra*, note 7.
[14] *Supra*, note 1.
[15] Still applicable in nullity suits by reason of the Judicature (Consolidation) Act, 1925, s. 32.
[16] (1849) 1 Rob.Ecc. 684.
[17] (1888) 14 P.D. 15.
[18] [1928] P. at p. 172.
[19] [1961] 1 All E.R. at p. 241.

validity by the other." It may be added that such a proposition becomes more remarkable when, as in *Hayward* v. *Hayward*, both parties were fully aware of the circumstances at the time of the bigamous marriage and the one who failed to raise the defence of bigamy in previous litigation was probably in fear of criminal prosecution, and known to be so by the other party, who used the situation for financial gain. Phillimore J. also drew attention to the remarkable consequences of the estoppel doctrine in permitting, and indeed legally enforcing, a condition of polygyny [20] or polyandry, thus stating with greater precision Dr. Lushington's reaction to a similar argument for estoppel in similar circumstances [21]: " I feel sure that in admitting an allegation of this description I should entirely defeat the law and throw the marital relation into entire confusion."

The argument that " *interest reipublicae ut sit finis litium* " is sufficiently met by the fact that, the doctrine of estoppel being excluded, a decree of nullity will be granted only on sufficient proof of the bigamous nature of the ceremony.[22] The authorities also provide adequate precedent for translating moral responsibility into financial liability in the case of those who knowingly go through an invalid ceremony or thereafter assert its validity. Thus in *Miles* v. *Chilton* [23] the woman who had been deceived was held entitled to alimony; in *Andrews* v. *Ross* [24] the woman who had knowingly " married " the former husband of her deceased sister was deprived of her costs; and in *Wilkins* v. *Wilkins* [25] the man was obliged to secure maintenance during joint lives for the bigamous " wife " who had borne him eight children. All in all, the thorough examination of an important point of evidence has resulted in the vindication of the practice of the civilians as against the trend of the modern decisions.

O. M. Stone.

## The Judicial Committee on Picketing and Trade Disputes

*Bird* v. *O'Neal* [1] raises a number of interesting points in connection with trade disputes upon which the Judicial Committee pronounced opinions without discussion of previous authority.

A union member who had been employed as a clerk was

20 The report contrasts polygamy with polyandry, but since polygamy means simply plurality of marriages or spouses, the more specific polygyny seems preferable.

21 (1849) 1 Rob.Ecc. at p. 700.

22 As in *Wilkins* v. *Wilkins* and *Hayward* v. *Hayward*; *quaere Woodland* v. *Woodland*.

23 *Supra*, note 16.

24 *Supra*, note 17.

25 *Supra*, note 2.

1 [1960] A.C. 907; [1960] 3 W.L.R. 584; [1960] 3 All E.R. 254 (P.C., on appeal from the West Indies Court of Appeal).

summarily dismissed with a week's wages in lieu of notice. Following the breakdown of voluntary negotiations, the failure of efforts at conciliation by the Labour Commissioner, and the flouting of the accepted norms of good industrial relations by the employer in refusing to implement the recommendations of a Board of Inquiry, the Executive Committee of the union resorted to the industrial weapon of picketing. It passed a resolution authorising the appointment of pickets by the organiser and general secretary. Six paid pickets were engaged.

The picketing was far from peaceful and was held to amount to an actionable nuisance. The Judicial Committee, therefore, was not called upon to pronounce upon the legality of peaceful picketing *per se* at common law—a point which does not appear to have been raised in England for half a century.[2]

In determining the responsibility of members of the Executive Committee, the courts below considered that the fact the pickets were appointed in pursuance of the Executive Committee's resolution made them the Executive Committee's servants. Without more ado, the trial judge held that although the predominant object of the members of the Executive Committee was the promotion of their own legitimate objects, they had conspired to use unlawful means to achieve those objects. He considered the relation of master and servant sufficient to raise a conspiracy. The Court of Appeal adopted the same approach, but differed from the trial judge in that it considered that the Executive Committee's predominant object was to injure the plaintiffs. The chief picket was brought into the conspiracy, although not a member of the Executive Committee, because he had combined with the Committee members for the purpose of picketing the premises.

The Judicial Committee considered that the predominant object of the Executive Committee was to further their own interests. The suggestion that a master and servant relationship existed between the members of the Executive Committee and the pickets was rejected. The latter were paid by and appointed on behalf of the union, which could only act through its agents, members of the Executive Committee. The Judicial Committee equated the position of the Executive Committee with that of the general manager of a company or of its foreman, whose power to engage, dismiss and control the activities of workmen does not create the relation of

[2] The absence of picketing cases from the law reports is a remarkable tribute to the tolerance shown in England. Police prosecutions, too, are comparatively rare—for a recent example see *Piddington* v. *Bates* [1960] 3 All E.R. 660. In *Ward, Lock and Co.* v. *Operative Printers' Assistants' Society* (1906) 22 T.L.R. 327, the Court of Appeal considered peaceful picketing, including persuasion, to be lawful at common law. See also *Lyons* v. *Wilkins* [1899] 1 Ch. 255 at 273–274, *per* Vaughan Williams L.J. (dissenting); *Ferguson* v. *O'Gorman* [1937] I.R. 621; *Ryan* v. *Cooke and Quinn* [1938] I.R. 512 at 519, *per* Johnston J. In most of the Irish cases it has been assumed that picketing is illegal *per se*.

master and servant between themselves and the company's other servants.[3]

The courts below had not examined what part, if any, each individual had played in connection with the unlawful incidents, and whether such part necessarily compelled the inference that he was a party to a conspiracy to use unlawful means to further the object of the picketing. In the absence of clear and convincing evidence implicating the persons concerned, the Judicial Committee properly refused to undertake such an investigation itself.[4] Two members of the Executive Committee had not been present when the resolution was passed, and all denied authorising or even knowing of the employment of unlawful means in the picketing.

Although unnecessary for their decision, their lordships considered it desirable to make some observations on the legislation relating to trade disputes which had figured prominently in the courts below, and was of paramount importance to trade unions and employers. The Trade Unions Act, 1939, contains provisions identical with those on trade interference and picketing contained in the British Trade Disputes Act, 1906,[5] while the definition of trade dispute follows that of the Industrial Courts Act, 1919.[6]

The employers contended that there was no trade dispute. Their first argument, that to constitute a trade dispute over dismissal there had to be a dispute between them and their remaining employees (none of whom were members of the union), was rejected by the trial judge and not raised again. It is quite untenable.[7]

The second argument was that lawful dismissal, with due notice or wages in lieu, cannot be the subject of a trade dispute. This was rejected at first instance and by the Judicial Committee. Indeed, one would have thought it beyond argument but for a dictum in an Irish case which appears to make the legality of dismissal the test.[8] A trade dispute is not confined to a dispute over the legal rights of the parties.

The third argument was that under the statutory definition a

3 [1960] 3 W.L.R. at 591, 592; [1960] A.C. at 919, 920. It might be arguable in the case of an unregistered union that members of its Executive Committee would be liable for a tort committed on behalf of the union either as individual tortfeasors, or as "employers" of the "union's" servants—see *Brown* v. *Lewis* (1896) 12 T.L.R. 455; *Bradley Egg Farms, Ltd.* v. *Clifford* [1943] 2 All E.R. 378. It is more normal to establish the existence of a conspiracy to injure.

4 [1960] 3 W.L.R. at 592; [1960] A.C. at 921.

5 (1906) 6 Edw. 7, c. 47, ss. 2, 3.

6 9 & 10 Geo. 5, c. 69, s. 8, which differs from the 1906 definition only in the inclusion of "any difference," *viz.*, Trade Dispute means "any dispute or difference . . . , etc."

7 See *per* Meredith J. in *Ferguson* v. *O'Gorman* [1937] I.R. at 634; see also *R.* v. *National Arbitration Tribunal, ex p. Horatio Crowther* [1947] 2 All E.R. 693; *Beetham* v. *Trinidad Cement, Ltd.* [1960] 1 All E.R. 274.

8 *Doran* v. *Lennon* [1945] I.R. 315 at 325, *per* Overend J. This dictum does not represent Irish law—see, *e.g.*, *Ferguson* v. *O'Gorman* [1937] I.R. 621; *Quigley* v. *Beirne* [1955] I.R. 62, where the Supreme Court reversed Dixon J. on this point; *Silver Tassie Co., Ltd.* v. *Cleary* (1958) 92 I.L.T.R. 21.

trade dispute is one " between employers and workmen or between workmen and workmen." It was contended that the employee who had been dismissed was not a " workman," and that there could be no trade dispute between the union itself and the employer. This view prevailed in the Court of Appeal. Adopting once again [9] the opinion of Lord Wright in *National Association of Local Government Officers* v. *Bolton Corporation*,[10] the Judicial Committee held that a trade union can be a party to a trade dispute as representing its members.

It is true that in this case the union had simply taken up the cause of one of its members, but the implications of accepting Lord Wright's opinion are somewhat wider. A union does not have to prove that individuals serving under an employer are disputing with him [11]—a union may raise a dispute on its own initiative.[12] It may raise a dispute with an employer, none of whose employees are members of the union, if he undercuts union standards.[13] The attitude of the Judicial Committee suggests that the courts will not question a union's capacity to represent its members—provided that in raising the dispute the union's executive is acting within the scope of its authority.[14]

This is a basically different approach from that of Dixon J. who, in a number of Irish cases,[15] held that where a dispute concerns the employment of persons who are not workmen, a trade union cannot supply the missing element by becoming a party to the dispute—at least where the union does not consist wholly of workmen. This reasoning has been challenged in Eire,[16] and the decisions of the Judicial Committee in the West Indies cases give renewed hope that it will not be applied in England. It is difficult to see why a union cannot be regarded as representing those

[9] [1960] 3 W.L.R. at 595, 596; [1960] A.C. at 924.

[10] [1943] A.C. 166 at p. 189.

[11] *Ibid. per* Viscount Simon L.C. at p. 176.

[12] *Beetham* v. *Trinidad Cement, Ltd.* [1960] 1 All E.R. 274, 279. See and compare *R.* v. *Industrial Disputes Tribunal, ex p. Kigass* [1953] 1 W.L.R. 411; *R.* v. *Industrial Disputes Tribunal, ex p. Technaloy, Ltd.* [1954] 2 Q.B. 46; *R.* v. *Industrial Disputes Tribunal, ex p. Queen Mary College* [1957] 2 Q.B. 483. *R.* v. *National Arbitration Tribunal, ex p. South Shields Corporation* [1952] 1 K.B. 46 turned on the definition of dispute under the Industrial Disputes Order.

[13] See *per* Meredith J. in *Ferguson* v. *O'Gorman, supra*; see also *Brimelow* v. *Casson* [1924] 1 Ch. 302 at 313, 314, where Russell J. held that the dispute was between the employer and the Actors' Association as representing the general body of actors. There is nothing in the report to indicate whether or not the employees concerned were members of the union: presumably it was not considered material.

[14] See *McCobb* v. *Doyle* [1938] I.R. 444; *Esplanade Pharmacy, Ltd.* v. *Martin* [1957] I.R. 285 at 292, *per* Lavery J.; *Beetham* v. *Trinidad Cement, Ltd.* [1960] 1 All E.R. at p. 279.

[15] *Smith* v. *Beirne* (1955) 89 I.L.T.R. 24; *Esplanade Pharmacy, Ltd.* v. *Larkin* [1957] I.R. 285 at 289; *British and Irish Steampacket Co.* v. *Branigan* [1958] I.R. 128.

[16] *Smith* v. *Beirne* (1955) 89 I.L.T.R. at 38, *per* O'Daly J.; *Esplanade Pharmacy, Ltd.* v. *Larkin* [1957] I.R. at 298, *per* O'Daly J. The Supreme Court found it unnecessary to express any opinion on the point.

members who are " workmen," or that the fact that some members are not workmen should affect the existence of a trade dispute.[17]

Finally, the Judicial Committee considered the meaning of the term " workmen " under section 2 of the Trade Unions Act, 1939, which does not define it but simply states " workmen includes labourers." Although the definitions in the Trade Disputes (Arbitration and Inquiry) Act, 1939, could not be imported into the Trade Unions Act, their lordships considered that, " in the absence of words of limitation," the subject-matter called for a wide and liberal interpretation which would include shop assistants and clerks.[18]

It may well be that " workman " here has been given a wider scope than the same term in the Trade Disputes Act, 1906, where it is defined as " every person employed in trade or industry." One would have thought that a strong case could be made out for giving these words a wide interpretation, but the Irish courts in recent cases [19] and the House of Lords in 1943,[20] regarded them as restricting the scope of the Act. The attitude of the Privy Council in the present case suggests that a different view might prevail today.[21]

M. A. HICKLING.

17 The fact that employers are also involved does not alter the nature of a dispute between workmen and workmen—see *Brimelow* v. *Casson*, *supra*. According to Dixon J. full-time officials are not " workmen "—*Smith* v. *Beirne*, *supra*, at p. 29. If they are members, does this bring his reasoning into play? It is submitted with respect that this reasoning is " strangely out of date."

18 [1960] 3 W.L.R. at 596; [1960] A.C. at 925.

19 *Smith* v. *Beirne*; *British and Irish Steampacket Co.* v. *Branigan*, *supra*.

20 *N.A.L.G.O.* v. *Bolton Corporation* [1943] A.C. at pp. 175–176, 181, 182–183, *per* Viscount Simon L.C., Lord Atkin and Lord Thankerton. Even Lord Wright, at p. 189, refrained from holding every corporation employee to be a " workman." Observations on the 1906 Act were *obiter*.

21 Although material in taxation, and in the anomalous branch of laws concerned with licensing, it is difficult to see why the element of profit-making, relied upon in cases cited above, should be material in the field of trade disputes. Pre-1906 disputes concerned with road repairers, lamplighters and dustmen employed by local authorities were regarded as " labour," "industrial " or " trade " disputes. Unions of Government and local authority employees, and of domestic workers appeared on the register in the 1890s. Placed in their proper contexts, speeches of the Lord Chancellor and Attorney-General support the view that all employed persons were included—see *Hansard* (1906) 4th Series (Commons), Vol. 164 at p. 232; *Hansard* (1906) 4th Series (Lords), Vol. 167 at 305–306. The definition then read " trade dispute means any dispute which is connected with the employment or non-employment or terms of employment or conditions of labour of any person." The Lord Chancellor accepted a definition in the present form as " in no prejudicial sense " affecting the original proposals of the government—*Hansard* (1906) 4th Series (Lords), Vol. 167 at 812. See also *Federated Municipal and Shire Council Employees' Union of Australia* v. *City of Melbourne* (1918–19) 26 C.L.R. 508 at 564, *per* Isaacs and Rich JJ. If organisations of municipal and governmental employees are not concerned with trade or industry, presumably they do not impose restrictive conditions on " trade or business." It would seem to follow from the definition of trade unions that they are not trade unions unless members are workmen. The argument that, if there can be trade unions to which they belong it is not an impossible use of language to say they can be parties to a trade dispute, hardly seems consistent with the imposition of a limited meaning on " trade or industry."

## Jurisdictional Problems in Nullity—2

It is interesting to see that the Court of Appeal have reversed the decision of Karminski J. in *Ross-Smith* v. *Ross-Smith* [1] and held that, when a marriage has been celebrated in England, English courts have jurisdiction to grant a decree of nullity even where the marriage is only voidable. There are strong arguments for and against the assumption of jurisdiction [2] but the Court of Appeal's decision is the more logical since that court had already decided in *Ramsey-Fairfax* v. *Ramsey-Fairfax* [3] that nullity decrees in voidable marriages were more akin to decrees of nullity in void marriages, where jurisdiction is rightly assumed on a wide variety of connecting factors, than to divorce petitions, where jurisdiction is still with some exceptions based on the domicile of the parties.

It will be remembered that in *Inverclyde* v. *Inverclyde* [4] Bateson J. took the view that, since voidable marriages were existing marriages, a suit to avoid them was like a divorce suit in that it affected status, therefore the court of the domicile of the parties was the proper court to assume jurisdiction. Although there were cases to the contrary,[5] this view was accepted by the Court of Appeal in *Casey* v. *Casey*,[6] where it was held that celebration of the marriage in England did not in itself confer jurisdiction to hear a petition alleging wilful refusal to consummate. *Casey* v. *Casey* was not followed in *Addison* v. *Addison*,[7] a Northern Ireland decision, which assimilated the grounds of jurisdiction in void and voidable marriages. Moreover the reasoning of *Inverclyde* v. *Inverclyde* was disapproved by the Court of Appeal itself in *Ramsey-Fairfax* v. *Ramsey-Fairfax* [8] where jurisdiction over a voidable marriage was assumed on the ground that both parties were resident in England.

Collingwood J. in *Hill* v. *Hill* [9] took the view that, since the decision in *Ramsey-Fairfax* v. *Ramsey-Fairfax* struck at the reasoning of the majority in *Casey* v. *Casey*, the latter decision must be confined to its peculiar facts,[10] and he assumed jurisdiction over a petition for nullity on the grounds of the husband's impotence on the ground that the marriage was celebrated in England. Karminski J. in *Ross-Smith* v. *Ross-Smith* differed

1 [1960] 3 All E.R. 70 (Karminski J.) and [1961] 1 All E.R. 255; [1961] 2 W.L.R. 71 (C.A.). The decision of Karminski J. was noted in 23 M.L.R. 699.
2 See 23 M.L.R. 699 at pp. 702, 703.
3 [1956] P. 126.
4 [1931] P. 29.
5 *Easterbrook* v. *Easterbrook* [1944] P. 10; *Hutter* v. *Hutter* [1944] P. 95 and *Robert* v. *Robert* [1947] P. 164.
6 [1949] P. 420.
7 [1955] N.I. 1.
8 [1956] P. 126.
9 [1960] P. 130.
10 *Casey* v. *Casey* was concerned only with wilful refusal to consummate, a ground which essentially arises after the marriage ceremony. *Hill* v. *Hill* was concerned with impotence, a factor existing at the time of the ceremony. *Ross-Smith* v. *Ross-Smith* involved alternative allegations of both grounds.

from Collingwood J., holding that *Casey* v. *Casey* was still good authority and binding on him. He refused to assume jurisdiction in a petition founded on the alternative grounds of impotence and wilful refusal to consummate, where the only connecting factor was that the marriage had been celebrated in England. The Court of Appeal (Willmer L.J., who read the judgment, Ormerod and Upjohn L.JJ.) unanimously reversed his decision and the result of their decision appears to be the complete demise of *Casey* v. *Casey*.

Jurisdiction has frequently been assumed in void marriages on the ground that the marriage was celebrated in England.[11] Is there any difference between void and voidable marriages for jurisdictional purposes? The ecclesiastical courts drew no distinction between the two as regards jurisdiction, and the jurisdiction of the High Court is derived from that exercised by the ecclesiastical courts.[12] In fact Bateson J. in *Inverclyde* v. *Inverclyde* was the first to draw such a distinction. The leading authority for the distinction was *Casey* v. *Casey* and after great deliberation the Court of Appeal came to the conclusion that the majority decision in that case [13] could not stand with the decision of the court in *Ramsey-Fairfax* v. *Ramsey-Fairfax*. In reaching this conclusion they were encouraged by the weighty reasoning of Lord MacDermott in *Addison* v. *Addison*.[14]

They also dismissed the minority reasoning of Somervell L.J. in *Casey* v. *Casey*. His view, argued from first principles, was that the court of the *lex loci celebrationis* was only justified in assuming jurisdiction where the matter in the petition disputed the actual validity of the ceremony.[15] The Court of Appeal argued that this would logically exclude jurisdiction in any case where the juristic capacity of the parties was called in question and this was contrary to established principle.[16] Furthermore when we allow the court of the *lex loci celebrationis* to consider the juristic capacity of the parties, *i.e.*, problems of age, prohibited degrees, bigamy, etc., why prohibit it from considering questions of physical capacity such as impotence, unsound mind, pregnancy *inter alia* and making decrees accordingly?

The Court of Appeal criticised the decision of Collingwood J. in *Hill* v. *Hill* in so far as it suggested that a petition on the ground

11 See *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Sottomayor* v. *De Barros* (1877) 3 P.D. 1; *Cooper* v. *Crane* [1891] P. 369; *Linke* v. *Van Aerde* (1894) 10 T.L.R. 426; *Hussein* v. *Hussein* [1938] P. 159; *Galene* v. *Galene* [1939] P. 237. There is some authority to this same effect going back before the Matrimonial Causes Act, 1857, *e.g.*, *Scrimshire* v. *Scrimshire* (1752) 2 Hag.Con. 395 at p. 411.

12 Matrimonial Causes Act, 1857, s. 22, re-enacted in substance by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32.

13 Given by Bucknill L.J. with whom Cohen L.J. concurred. Somervell L.J. concurred in their decision, but gave different reasons.

14 [1955] N.I. 1.

15 [1949] P. 420 at p. 433.

16 See cases cited *supra*, note 11.

of wilful refusal might be distinguishable from one alleging impotence.[17] It is true that the latter exists at the time of the marriage and the former does not. It is also true that the ecclesiastical courts granted decrees in cases of incapacity and not wilful refusal. From this it is easy to argue a distinction between the two for jurisdictional purposes, but, as the Court of Appeal pointed out, this solution is unacceptable. Frequently these two are alleged as alternative grounds and the true ground cannot be decided until after the evidence is heard. Collingwood J.'s suggestion would mean that the court would have to hear the case before it could decide whether or not it had jurisdiction.

The result of the decision in *Ross-Smith* v. *Ross-Smith* would appear to be that there is now no justification for distinguishing void and voidable marriages for jurisdictional purposes. Jurisdiction in voidable marriages can now be assumed by English courts (i) if the parties are domiciled in England, (ii) if they reside within the jurisdiction,[18] but residence of the petitioner alone is not enough,[19] (iii) if the marriage was celebrated in England [20] and (iv) under the deserted wives jurisdiction of the Matrimonial Causes Act, 1950.

It is, of course, possible for the House of Lords to reverse the decision. They could, if it comes to that, overrule *Ramsey-Fairfax* v. *Ramsey-Fairfax* and restore the authority of *Inverclyde* v. *Inverclyde*. Generally speaking, however, appeals are more frequently made from refusal to assume jurisdiction,[21] and the House of Lords are less likely to have an opportunity to consider the point now that the Court of Appeal have extended the jurisdiction of the High Court to the limits. Nevertheless leave to appeal has been granted in *Ross-Smith* v. *Ross-Smith*.

J. A. ANDREWS.

## CRUELTY AND INSANITY IN DIVORCE

IN the recent case of *Sofaer* v. *Sofaer*,[1] Collingwood J. had to consider once again the difficult problem of insanity as a defence to a petition for divorce on the ground of cruelty.

The parties in the case in question were married in 1937 and

17 [1961] 1 All E.R. 255 at p. 262.
18 *Ramsey-Fairfax* v. *Ramsey-Fairfax* [1956] P. 126.
19 *De Reneville* v. *De Reneville* [1948] P. 100.
20 *Ross-Smith* v. *Ross-Smith* [1961] 1 All E.R. 255.
21 There are various reasons for this. Generally speaking the petitioner's determination to break the marriage ties is greater than the defendant's desire to maintain them. Many suits are undefended (*e.g.*, *Hill* v. *Hill*, *supra*). Furthermore the defendant always has a further chance to fight on the facts once jurisdiction is assumed. To some extent the defendant's reputation is at stake, but if he is neither domiciled nor resident within the jurisdiction, this threat is not very great. The same might not be true if a claim for maintenance is also made.
1 [1960] 3 All E.R. 468; [1960] 1 W.L.R. 1173.

there were four children of the marriage. In the years between 1937 and 1958 the wife was guilty of a sustained course of conduct which, when it came to consider the matter, the court had no difficulty in holding to be cruelty. In 1958, after the parties had come to England, the wife was certified insane and detained in a mental hospital where she has ever since remained.

The husband petitioned for divorce on the ground of the wife's cruelty. The court, as has been said, had no difficulty in holding that cruelty on the part of the wife had been established and the question was therefore whether she was, at the time she committed the acts of cruelty, so insane as not to be responsible for her conduct. If she was, then the husband would not of course be entitled to a decree.

Collingwood J. held that the test to be applied to the wife's conduct was the M'Naughten Rules.[2] Since there was no evidence to show that the wife did not know the nature and quality of her acts so as to bring her within the first " limb " of the Rules the case turned on whether she knew that what she was doing was " wrong." Now it is axiomatic that in the criminal law " wrong " in the second branch of the M'Naughten Rules means " legally wrong." [3] The learned judge however held that in the present context the word " wrong " is not confined to conduct which is " legally wrong " but includes conduct which is " culpable " or " blameworthy." This allowed him to hold that the wife was not, in the case before him, insane within the meaning of the M'Naughten Rules since there was evidence to suggest that she knew that her conduct was " wrong " in this sense—*i.e.*, " culpable " or " blameworthy."

It is remarkable that there does not seem to be any previous case or judgment containing a clear statement that the word " wrong " in this context (or indeed in any context) is to be interpreted in this way. And in fact there are dicta of Henn Collins J. in *Astle* v. *Astle*,[4] Asquith L.J. in *White* v. *White* [5] and Lord Goddard C.J. in *Palmer* v. *Palmer*,[6] which suggest that if the M'Naughten Rules are the appropriate test in this branch of the law, the Rules mean in this context what they mean in the context of the criminal law.

In holding that " wrong " in this context means " culpable " Collingwood J. seems to have based himself upon the judgment of Asquith L.J. in *White* v. *White*, in which the learned Lord Justice quoted with approval from the judgment of the Court of Appeal in *Hanbury* v. *Hanbury*.[7] It is, however, very difficult to find in the

2 10 Cl. & Fin. 200.
3 *R.* v. *Windle* [1952] 2 All E.R. 1; [1952] 2 Q.B. 826.
4 [1939] 3 All E.R. 967 at p. 970; [1939] P. 415 at p. 419.
5 [1949] 2 All E.R. 339 at p. 348; [1950] P. 39 at p. 52.
6 [1954] 3 All E.R. 484 at p. 496; [1955] P. 4 at p. 9; [1954] 3 W.L.R. 756 at p. 760.
7 [1960] 3 All E.R. at p. 472; [1960] 1 W.L.R. at p. 1177.

judgment of Asquith L.J., or in the citation from *Hanbury* v. *Hanbury*, any indication that " wrong " in this context means anything other than what it means in the criminal law.

But, in spite of all this, it must freely be admitted that it does seem inevitable that the word " wrong " should in this context mean something other than the " legally wrong " of the criminal law. For if " wrong " in this context were to be interpreted in the same way as in the criminal law, it is obvious that the test could have no possible application to any case in which the conduct constituting the cruelty did not itself amount to a criminal offence.

One cannot help wishing however that Collingwood J., in holding that the word was to be interpreted as meaning " culpable " or " blameworthy," had given some indication of what was meant by " culpable " and " blameworthy."

It is easy to assume, and there is much in the case to suggest, that " culpable " in this context, since it cannot mean " legally wrong," must mean " morally wrong." Such an interpretation however inevitably leads to an obvious difficulty. Is the test of morality an objective one or a subjective one? Must the respondent know that his [8] conduct was " wrong " according to the standards of morality accepted by the majority of the members of society [9] or is it enough that he considered the conduct to be immoral, according to his subjective moral standards? Either view would produce very real difficulties.

It may be however that " culpable " in this context does not mean " morally wrong " but rather " having legal consequences in the civil (as opposed to the criminal) law." This meaning is suggested by the dictum of Lord Esher M.R. above considered. On this view the question which would have to be asked in order to determine whether a respondent could bring himself within the second limb of the M'Naughten Rules would be " Did he know that what he was doing was capable of having legal consequences in the civil law? " To particularise, in a case where the divorce is being sought on the ground of cruelty the question would be " Did the respondent know that what he was doing amounted to cruelty in law? " Since however it is axiomatic that it is almost impossible to define with any confidence what amounts to cruelty in law, the acceptance of this test would mean that the number of cases in which a petitioner would be able to get a divorce on the ground of cruelty where the respondent pleaded insanity would be very few. This, it is submitted, is undesirable and against the trend of the modern law.

Moreover there is no indication that such a test as this was in fact applied in *Sofaer* v. *Sofaer*. It does not seem to have been

[8] The respondent is, for the sake of convenience, conceived of as masculine.

[9] This is of course the meaning given to the word " wrong " by the High Court of Australia in the context of the criminal law. See *R.* v. *Stapleton* [1952] A.L.R. 929.

asked in that case whether the respondent knew that what she was doing amounted to cruelty in law. Indeed if this question had been asked it seems clear that the result of the case would have been different.

It is to be hoped then that if " wrong " in the second limb of the M'Naughten Rules does in this context mean " culpable " there will be forthcoming in the not too distant future some authoritative exposition of what is meant by culpable. In view of the difficulties above mentioned it is not easy to see what form that exposition could satisfactorily take.

In 1956 the Royal Commission recommended [10] that insanity should be no defence to a charge of cruelty.[11] Perhaps the difficulties considered above provide one reason at least why it would be salutary if Parliament were to see fit to implement the Commission's recommendation.

H. W. Burnett.

## " Once a Mortgage, Always a Mortgage "

One of the manifestations of the above maxim, which is more than 160 years old,[1] is that clogs on the equity of redemption are void. Thus, in general terms, any provision, whether in the mortgage itself or in any collateral but connected transaction, which prevents the mortgagor from getting the whole of the mortgaged property back on repayment of the moneys due under the mortgage will have no effect. Such a provision may sometimes appear in disguise as in the celebrated case of *Samuel* v. *Jarrah Timber and Wood Paving Corporation*,[2] where a limited company borrowed money upon the security of its debenture stock and granted the lender an option to purchase the stock exercisable within twelve months. Within this period and before the company gave notice of its intention to repay the loan the lender purported to exercise the option. It was held by the House of Lords that the option was void since its exercise would debar the company from getting back the mortgaged property on repayment of the principal with interest and costs. On the other hand, in *Lisle* v. *Reeve* [3] Buckley J. held that where a mortgage is already on foot and by a separate and distinct transaction entered into after the creation of the mortgage, the mortgagor gives the mortgagee an option to purchase the mortgaged property, such option is perfectly valid, not being part of the original mortgage transaction. The maxim " once a mortgage, always a mortgage," does not, therefore, prevent *subsequent* dealings with the mortgaged property by the mortgagor in favour of

10 (1956) Cmd. 9678.
11 As, of course, was held by Denning L.J. in a minority judgment in *White* v. *White* [1949] 2 All E.R. 339; [1950] P. 39.
1 See *Seton* v. *Slade* (1802) 7 Ves. 265 at p. 273.
2 [1904] A.C. 323.
3 [1902] 1 Ch. 53.

the mortgagee provided that it was no part of the original mortgage transaction that any such dealings should be effected.

Against this background, there arose in the recent case of *Lewis* v. *Frank Love Ltd.*,[4] the novel point whether an option granted by a mortgagor to a transferee of an existing mortgage, constituted a clog on the equity of redemption where it was a term of the agreement by the transferee to take the transfer of the mortgage that the option should be granted.

In that case, the plaintiff charged certain property by way of legal charge on October 31, 1946, to secure (*inter alia*) a principal sum of £6,000. After the death of the mortgagee, his personal representatives pressed for payment and the plaintiff negotiated with the defendants with a view to the defendants paying off the amount then owing under the legal charge and taking a transfer of it. The defendants agreed with the plaintiff to take such a transfer on condition that the plaintiff granted them an option to purchase part of the mortgaged property exercisable at any time within two years. Both the plaintiff and the defendants were represented by solicitors who fully appreciated the risk of the proposed option being void as a clog on the equity of redemption. The transaction was eventually carried out by means of two documents, both bearing the same date, the first consisting of a transfer of the mortgage and the second of an agreement between the plaintiff and the defendants whereby in consideration of the defendants agreeing not to call in the mortgage during the ensuing two years the plaintiff granted the defendants an option to purchase part of the mortgaged property. The plaintiff sought a declaration that the option was void. After considering the cases referred to above (together with certain other cases) and concluding that there was not, in the reports, any case governing the present situation, Plowman J. said (and held): " But in my view the principles on which the courts have held that a clog on the equity of redemption is void apply just as much to a transfer of a mortgage which is arranged between the mortgagor and the transferees, where one of the terms of that arrangement is that the transferees in return for parting with their money shall have an option to purchase part of the mortgaged property." In coming to this conclusion, the learned judge held (a) that the fact that the option was granted by a separate document was irrelevant since equity looked to the substance of the transaction and not to the form and (b) that " the doctrine of a clog on the equity is a technical doctrine which is not affected by the question whether in fact there has been oppression, and which applies just as much where parties are represented, as they were here, by solicitors."

In the instant case, the defendants had purported to exercise the option and counterclaimed for specific performance of the

[4] [1961] 1 All E.R. 446; [1961] 1 W.L.R. 261.

agreement which they alleged resulted from such exercise or damages for its breach. The claim for specific performance was abandoned during the course of the action and the effect of the decision as to the validity of the option was, of course, that the claim for damages failed. At the date when the proceedings were commenced, the two-year period during which the defendants had agreed that in consideration of the option they would not call in the mortgage had expired so that, independently of the validity of the option agreement, they were entitled to call in the mortgage forthwith. Presumably, however, there would, in the light of this decision, have been nothing to have prevented the defendants from calling in the mortgage at any time *during the two-year period*, since the consideration for their agreement not to do so consisted in nothing more than the void option.

Notwithstanding the decision in *Lewis* v. *Frank Love Ltd.*, it would seem to be possible to carry out the intention of the parties in that case by effecting the transaction in a slightly different way. If, upon it appearing that the proposed transferees of the mortgage would only take a transfer if they were granted an option to purchase part of the property, the mortgagor were to grant such an option, not to the transferees, but to the existing mortgagee, and *then* the mortgage together with the option were transferred by the mortgagee to the transferees, the transaction would seem to be unobjectionable. Nevertheless, this is a branch of the law which is guarded jealously by equity and where, perhaps, the true underlying principle is *honi soit qui mal y pense*.

E. H. Scamell.

## What is an "Imperfect Trust Provision"?

In *Re Wykes' Will Trusts, Riddington* v. *Spencer* [1] Buckley J. had to consider the meaning of the phrase "an imperfect trust provision" as defined by section 1 (1) of the Charitable Trusts (Validation) Act, 1954.[2]

The Act, which only applies to instruments taking effect before December 16, 1952,[3] provides that where such instrument contains an imperfect trust provision, which would be valid if all the objects were exclusively charitable but which, otherwise, is invalid,[4] the provision shall be deemed to have effect as if, before the commencement of the Act, all the declared objects were charitable [5] and as if, after the commencement of the Act, the property is required to be applied only to charitable purposes.[6] These provisions are

1 [1961] 2 W.L.R. 115; [1961] 1 All E.R. 470.
2 2 & 3 Eliz. 2, c. 58. See 18 M.L.R. 152 (P. S. Atiyah).
3 *Ibid.* s. 1 (2).
4 *Ibid.* s. 2 (1).
5 *Ibid.* s. 1 (2) (*a*).
6 *Ibid.* s. 1 (2) (*b*).

subject to saving clauses in respect of funds which have been distributed on the assumption that the disposition was invalid [7] and of the rights of those who would be entitled if the Act had not been passed.[8]

The Act is based on the recommendations of the Charitable Trusts Committee, 1950,[9] following the decisions in *Chichester Diocesan Fund* v. *Simpson*,[10] *Ellis* v. *I.R.C.*[11] and *Oxford Group* v. *I.R.C.*[12] that dispositions which permitted the funds to be applied to non-charitable objects would fail, even though some of the available objects were charitable. In the case of trusts having mixed charitable and non-charitable objects, the Committee recommended that the fund should be permitted to be applied to the purely charitable objects. In the case of trusts which had been generally recognised to be charitable, but which, it subsequently appeared, were not charitable, the Committee recommended the preparation of a *cy-près* scheme.[13] In the case, however, of trusts which were created before 1951 but, as in the instant case, were not intended to come into operation until the termination of some prior interest, it was recommended that a charitable scheme should only be permitted if the primary object was charitable.[14]

The legislature did not accept this distinction. The long title of the Act declares it to be " An Act to validate . . . and restrict to charitable objects, certain instruments . . . providing for property to be held for objects partly but not exclusively charitable," whilst the term " imperfect trust provision " is defined as " any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable." [15]

In the instant case a testator, by his will made in 1944, left a life interest in his residuary estate to his widow, who died in April 1954. He directed that, on her death, the residue should be divided into three equal parts and disposed of, as to one part, " . . . to the board of directors of E. Wykes (Leicester), Ltd. to be used at their discretion as a benevolent or welfare fund or for welfare purposes for the sole benefit of the past, present or future employees of the company." It had been established that the Act would not apply to a disposition under which some of the property

[7] *Ibid.* s. 2 (2).
[8] *Ibid.* s. 3.
[9] Report of the Committee on the Law and Practice relating to Charitable Trusts (1952) Cmd. 8710, paras. 487–542.
[10] [1944] A.C. 341; [1944] 2 All E.R. 60; 113 L.J.Ch. 225; 171 L.T. 141.
[11] (1949) 13 Tax.Cas. 178.
[12] [1949] 2 All E.R. 537; 31 Tax.Cas. 221.
[13] Cmd. 8710, *supra*, para. 502.
[14] *Ibid.* paras. 516 and 517.
[15] s. 1 (1).

must be applied for non-charitable purposes [16] but Buckley J. pointed out [17] that, although no class of the public was involved, the fund might be used exclusively for charitable purposes if it were wholly applied for the relief of poverty. Equally, it could be used for non-charitable purposes.

It might, therefore, seem clear that this was an imperfect trust provision, but the learned judge was faced with the restrictive interpretation which had been placed upon this phrase in *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor.*[18] In that case, money had been raised by public donations for the purpose of " defraying funeral expenses [of the victims of a disaster], caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the Mayors may determine." If this was to be regarded as a single disposition,[19] and Harman J., at first instance, and Evershed M.R. and Romer L.J., in the Court of Appeal, were of the opinion that that was the correct construction, then it was clearly outside the Act since some part of the fund must be applied to the first purpose, which was private. Harman J., however, went on to consider the position if the third purpose could be regarded as separate from the other two. He expressed the view that, even in such a case, the words did not constitute an " imperfect trust provision." [20] In his opinion, the long title of the Act revealed an intention to include only those dispositions which declared the objects of the trust in such a form as to include by express reference some legally charitable purpose; such, that is, as would authorise the fund to be applied to a charitable purpose if words which were too wide or too vague were excluded. It may be said at once that this " blue pencil " test has been applied in other branches of the law without producing conspicuously desirable results and there is no reason to suppose that its use here would be any more successful.

In the Court of Appeal, Romer L.J. took a similar view, though he, more clearly perhaps than Harman J., indicated that the point was *obiter.*[21] Lord Evershed also stated that the point was not material to his decision [22] but he, apparently, would have considered a disposition which had within it " at least the notion of charitable objects or objects analogous thereto " as within the Act.

16 *Vernon* v. *I.R.C.* [1956] 3 All E.R. 14. Accepted in *Re Gillingham, infra,* note 18. In *Vernon's* case, Upjohn J. also pointed out that the Act only applied to dispositions that would otherwise be invalid and not to those against which there was no objection, *e.g.*, on grounds of perpetuity or uncertainty.

17 [1961] 2 W.L.R. 115 at 119.

18 [1958] Ch. 300; [1958] 1 All E.R. 37; [1957] 3 W.L.R. 1069; affd. C.A. [1959] Ch. 62; [1958] 2 All E.R. 749; [1958] 3 W.L.R. 325.

19 s. 2 (3).

20 [1958] 1 Ch. 300 at 306.

21 [1959] 1 Ch. 62 at 77.

22 *Ibid.* at p. 75.

Cross J. expressed himself as bound to follow the view of Harman J. in *Re Harpur's Will Trusts, Haller* v. *Att.-Gen.*[23] although, again, this point was not essential to the decision. A fund had been left to " such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen and other members of H.M. Forces who have been wounded or incapacitated during the recent world wars." Avowedly adopting a restrictive attitude to the interpretation of the Act the learned judge held that the use of the word " objects " in the definition indicated that the Act was not intended to extend to gifts to " institutions " or " associations." The latter type of trust was perfectly good since the class of donees was not uncertain. It is fair to say that the reasoning in support of this proposition is not very convincing.[24] Such trusts, if valid, would in any event fall outside the Act and there seems no reason to suggest that, because the legislature had provided for this contingency elsewhere in the Act, it did not intend to include those that happened to be invalid for some other reason in the definition of imperfect trusts. Upon the question dealt with in the *Gillingham* case, Cross J. purported to adopt the reasoning of Harman J. In fact he came closer to the views of Evershed M.R. since he was prepared to hold that the disposition might be construed as a trust for charitable or benevolent objects and the mere fact that this meaning was implicit rather than express would not take the disposition outside the Act.[25]

In the *Gillingham* case, Ormerod L.J. had dissented from the majority. He decided that the trust could be regarded as three separate dispositions and accepted the argument of counsel for the Attorney-General [26] that the definition clearly covered the third object. In his view section 1 (1) was unambiguous and, accordingly, there was no need to have regard to the long title.[27]

Buckley J., in the instant case, noted that the views of Evershed M.R., Romer L.J. and Harman J. on the question at issue were *obiter*. In his opinion, Cross J. had not decided *Re Harpur* on this ground and the reference to the binding nature of the remarks of Harman J. on the subject only applied in case Cross J. was wrong in his construction of the will as implying a gift to charitable or benevolent institutions. This evaluation is certainly correct and it is, therefore, true to say that Cross J. did not hold the view of Harman J. to be correct, although it must be admitted that he would have done so, at least in his construction of those remarks, had it been necessary to do so.

Faced with a series of *obiter dicta*, Buckley J. felt himself entitled to adopt the approach favoured by Ormerod L.J.[28] The

[23] [1960] 3 W.L.R. 607; [1960] 3 All E.R. 237.
[24] [1960] 3 All E.R. 237 at 243.
[25] *Ibid.* at p. 242.
[26] Now Buckley J.
[27] [1959] 1 Ch. 62 at 80.
[28] [1961] 2 W.L.R. 115 at 121–123.

long title of the Act, as he pointed out, may not be looked at to modify the interpretation of plain language and the definition is nothing if not plain. Moreover, he said, even if the long title is to be taken into account, it is not possible to contend that an expression such as " public purposes " which embraces both charitable and non-charitable purposes is any less within the language of the long title than the expression " charitable or other public purposes."

It is to be hoped that the view of Ormerod L.J. and of Buckley J. will prevail.[29] Harman J. called it " very far-reaching " and suggested that, if it was correct, " the vaguer the words are, the better they will do." But it must be borne in mind that all the instruments to which the Act applies will have been made at a time when the law required a high degree of certainty. No deliberate attempt will have been made, therefore, to take advantage of the laxity permitted by the Act. If, by chance, the do-it-yourself man has, in ignorance, taken such advantage, is there any valid reason why the law should recoil from allowing him his way? As Buckley J. said, it is not for the court to corset the clearly expressed intention of the legislature into some shape which accorded better with professional legal thought than the natural meaning of the words. Cross J. could not see what reason the legislature had for passing a purely retrospective Act of this nature but that in itself is no reason for construing it restrictively. It may well be that the purpose of the Act was to make " very far-reaching " changes [30] and since this appears to be so the courts must accept it.

One may, however, sympathise with Cross J. on this point of legislative intention. It is fortunate that Parliament does not indulge a taste for purely retrospective legislation. Inevitable though the result in the instant case may be it only lends force to the question, if the law is in need of reform why not reform it? [31] Is it sufficient to tell those who may be affected that, if they have already acted on the assumption that the law would do its best to help them achieve their public spirited ends, they may rely on it to do so but that if, in the future, they act on this assumption, they will be disappointed unless they express their wishes in language so technically exact that there is no room for the slightest possibility of misunderstanding?

R. W. Rideout.

[29] See (1958) 74 L.Q.R. at p. 490 (P. S. Atiyah); [1954] C.L.J. 41 (S. J. Bailey).
[30] See (1958) 74 L.Q.R. 190 (P. S. Atiyah).
[31] In this respect it is interesting to note that the (Victoria) Property Law Act, 1928, s. 131; the (New Zealand) Trustee Amendment Act, 1935, s. 2, and the (New South Wales) Conveyancing Act, 1938, s. 37D, provide that no trust shall be held to be invalid by reason of some non-charitable and invalid as well as some charitable purpose being or being deemed to be included in any of the objects of the trust. These legislative provisions are not purely retrospective.

## The "Proper Law" and the Proper Law

The House of Lords decision in *Philipson-Stow* v. *I.R.C.*[1] is of considerable interest to conflict and revenue lawyers alike. A testator had made his will in English form containing an express declaration that inasmuch as he had an English domicile (which was in fact the case at all material times) it should be construed and should operate, so far as the case admitted, according to English law. He devised and bequeathed his residuary estate, which included undivided shares in land situated in the Orange Free State and regarded by the *lex situs* as immovable property, to trustees to hold on trust for sale so as to devolve with a family property in Sussex which he had specifically devised on trust for various persons in succession. South African law evidently made no objection to such a trust [2] and the trustees duly became the registered owners of the land in accordance with that law when the estate had been fully administered.

In proper exercise of a power conferred by the will to postpone the sale of this land, the trustees retained it unsold. The life tenant—to whom the trustees had paid the income arising from this land as enjoined by the will—died in 1954. It accordingly fell to be decided whether the land was exempted from English estate duty by virtue of the provision of section 28 (2) of the Finance Act, 1949, to the effect that property passing on the death of a person "shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the *proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes*, is the law neither of England nor of Scotland and . . . (*c*) that the property so situate is, by the law of the country in which it is situate, immovable property."

The Revenue conceded that the land was immovable by its *lex situs* but claimed duty on the basis that the "proper law" of the "disposition" under which it passed was the law of England. A majority of the House [3] held that duty was not exigible, the decision turning upon the construction of the words of the subsection italicised above. The following points emerge from the speeches:

(a) In the present context, the term "proper law" cannot possess the connotation of a selected or intended law as it does in the more familiar and less esoteric realms of contracts and marriage settlements.[4] No one can select the law which is to apply to the

[1] [1960] 3 W.L.R. 1008, reversing, by a majority of four to one, a decision of the Court of Appeal ([1960] Ch. 313; see Korah [1960] *British Tax Review* 104, which, by a majority of two to one, upheld the decision of Upjohn J. [1959] Ch. 395) to the effect that duty was exigible. Finally, then, five judges considered duty not to be exigible, four that it was.

[2] Unlike the Italian law in *Re Piercy* [1895] 1 Ch. 83.

[3] Viscount Simonds (with whom Lord Tucker concurred), Lords Reid and Denning; Lord Radcliffe dissented.

[4] *Per* Viscount Simonds at p. 1013, Lord Reid at pp. 1018–1019, Lord Denning at p. 1029.

" devolution " of his property on his intestacy, for instance, or the law which is to regulate the " dispositions " in his will inasmuch as it is axiomatic that succession to movables is governed or determined (which is what " regulated " means [5]) by the law of the deceased's last domicile and succession to immovables by the *lex situs*.[6] If the term " proper " in relation to " law " means anything here, it means, said Lord Reid, " the law regulating the disposition under or by virtue of which the foreign immovable passes." [7]

(b) Lord Reid also observed that property may pass by various kinds of " disposition," such as " will, *inter vivos* disposition or settlement based on contract." [8] In the present context, " disposition " must mean the particular devise in question. Were it to be held that it meant the will as a whole, one would, as remarked by Viscount Simonds, be in an impossible position when confronted with " a will which, being in other respects an ' English will,' purported to devise in strict settlement land in South Africa." [9]

(c) By " devolution " is meant devolution by operation of law, that is, by heirship or kinship.[10]

(d) In the light of the above, notwithstanding the express choice-of-law clause, it had still to be decided whether the " disposition " was " regulated " by South African law. In holding that it was so governed, Viscount Simonds indicated that the " proper law " might change with a change in the subject-matter so that, were the land to be sold and the proceeds gathered in, the " proper law " would become English law. But, until sale, the relevant law was that of South Africa—what passed on the life-tenant's death was the land, the immovable, despite the fact that in English domestic law it might be converted into personalty—and the " disposition " had operated, trust or no trust, for the very simple though cogent reason that South African law allowed it to do so.[11] Since, however, it is generally considered that the decision in *Re Piercy* [12] " should be dismissed as ingenious legerdemain," [13] it is a matter for regret that Viscount Simonds and Lord Radcliffe appear inferentially to have approved it.[14]

(e) It is incorrect to say that, once it is decided that any property in question is immovable, it must follow that the " proper

5 *Per* Viscount Simonds at p. 1015.
6 *Per* Viscount Simonds at p. 1016, Lord Reid at p. 1019, Lord Denning at pp. 1029–1030. *Cf. per* Lord Radcliffe at p. 1021.
7 At p. 1019. *Cf.* Viscount Simonds at p. 1013.
8 At p. 1018.
9 At p. 1014. And see *per* Lord Denning at p. 1028.
10 *Per* Lord Denning at p. 1028.
11 At pp. 1014–1016. *Cf. Re Hewitt* [1915] 1 Ch. 228, which illustrates that where the term " proper law " is accorded its usual connotation, the rule is " once the proper law, always the proper law."
12 *Supra.*
13 The words of Bland in a note on the present case at first instance: (1959) 8 I.C.L.Q. 577.
14 At pp. 1015–1016, 1024, respectively. The latter calls the case " curious."

law " regulating its " devolution " or " disposition " is the *lex situs* and thus that the subsection is tautologous. In the opinion of Viscount Simonds, it " may contemplate cases—and there may be such cases—where the law of a country, though it regards certain property as an immovable, may yet in certain circumstances regard its devolution, etc., by reference to another law. Nor even if there is some tautology, does it have much weight with me." [15] Doubtless, therefore, the foreign immovables in *renvoi* cases such as *Re Ross*[16] and *Re Duke of Wellington, decd.*[17] would not today attract the exemption.

(f) In the speech of Lord Denning there is a most useful indication that the construction of a will may be governed by the law of the testator's domicile when he made it rather than by that of his domicile at death—subject, of course, in the case of immovables, to any overriding provisions of the *lex situs*.[18]

P. R. H. Webb.

## Illegality—The Limits of a Statute

Economy in juristic concepts is useful, promoting simplicity and clarity in arrangement, but Occam's razor can be applied too sharply, if the result is to cast too many different situations within the ambit of a single rule. The law relating to illegality in contract has been the victim of such a tendency. Until recently this topic was formally governed by a few maxims, very widely stated and usually applied in a mechanical fashion, with little or no account taken of the policy considerations causing the law to condemn the particular contract or of how best they could be promoted. The pressure of events, particularly the vastly expanding field of state intervention with the minutiae of daily life, has compelled a reappraisal. Several commentators have pointed out the need for a more flexible approach,[1] and for a realisation that there is not one or even two but many kinds of illegality.[2]

There is scope for much further analysis along these lines and for a full statement of the problems involved which could provide useful guidance to the courts. The latter however have not been insensitive to modern developments,[3] and the recent case of

[15] At p. 1013. *Cf.* the view of Lord Radcliffe at p. 1023.
[16] [1930] 1 Ch. 377.
[17] [1947] Ch. 506; [1948] Ch. 118 (C.A.).
[18] At p. 1030.
[1] See, *e.g.*, Grodecki, 71 L.Q.R. 254; Guest, 5 J.S.P.T.L. 90.
[2] See, *e.g.*, Diamond, 22 M.L.R. 451 citing Corbin, § 1574, pp. 1055–1056. Honoré, 75 S.A.L.J. 32 makes some useful suggestions for greater precision in terminology.
[3] See, *e.g.*, *Bennett* v. *Bennett* [1952] 1 K.B. 249; [1952] 1 All E.R. 413; *Goodinson* v. *Goodinson* [1954] 2 Q.B. 118; [1954] 2 All E.R. 255; *Marles* v. *Philip Trant* (*Mackinnon third party*) [1954] 2 Q.B. 29; [1953] 1 All E.R. 651; *St. John Shipping Corporation* v. *Joseph Rank, Ltd.* [1957] 1 Q.B. 267; [1956] 3 All E.R. 683.

*Archbolds (Freightage) Ltd.* v. *Spanglett, Ltd. (Randall third party)* [4] makes a useful contribution in this field.

In this case the plaintiffs, a firm of carriers, sub-contracted to the defendants the carriage from Leeds to London of two hundred crates of whisky belonging to the third party. Owing to the negligence of the defendants' driver the goods were stolen and the plaintiffs sued for damages. *Ex facie*, there was no answer to this claim but the defendants contended that the contract was illegal because their vans including the van in which the whisky was carried only had " C " licences, which enabled them to carry the defendants' own goods but not to carry the goods of others for reward. The Court of Appeal affirmed the decision of Slade J. rejecting this defence and giving judgment for the plaintiffs for £3,674 18s. 3d.

There are a good many dicta in earlier cases [5] suggesting that illegality in the course of performance renders a contract illegal but *Marles* v. *Trant* [6] and *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[7] have demonstrated that view to be an over-simplification. The instant case provides further clarification of the true position and also of the criteria for deciding whether a contract is implicitly prohibited by statute.

One question which naturally arose in the light of the previous authorities was whether the statutory restriction on carriage of goods by " C " licensees implicitly forbade contracts for the carriage of goods in " C " licensed vehicles. But on one view of the facts this question would never have been reached since it could plausibly be argued that the contract was simply for the carriage of the whisky from Leeds to London and that though the parties contemplated that the goods would be carried in the particular van, SXY 902, in which they were in fact carried, this was not contractually stipulated for. If this were so the contract when made would have been valid. It is true that the defendants had performed the contract illegally and indeed had always intended to do so. This case however is different from other cases of illegality in the performance of contract in which it has been the person who performed illegally who sought to enforce the contract. Here the person who had performed illegally sought to rely on his own illegality, an unmeritorious plea made more unmeritorious by the fact that the plaintiff did not know that the defendant's van SXY 902 only had a " C " licence.[8]

[4] [1961] 2 W.L.R. 170; [1961] 1 All E.R. 417.

[5] *e.g.*, *Bensley* v. *Bignold* (1822) 5 B. & Ald. 335 at 342; *Anderson* v. *Daniel* [1924] 1 K.B. 138 at 145; *B & B Viennese Fashions* v. *Losane* [1952] 1 All E.R. 909 at 912 and 913.

[6] [1954] 2 Q.B. 29; [1953] 1 All E.R. 651. See Coutts, 16 M.L.R. 372.

[7] [1957] 1 Q.B. 267; [1956] 3 All E.R. 683: see Grunfeld, 20 M.L.R. 172.

[8] There was considerable dispute as to whether the plaintiffs had actual or constructive knowledge. See Sellers L.J.: [1961] 2 W.L.R. at 173; [1961] 1 All E.R. at 419; and Pearce L.J. [1961] 2 W.L.R. at 174–175; [1961] 1 All E.R. at 420–421. The trial judge's finding that they had not was accepted.

Slade J. appears to have decided the case simply on this point [9] but the Court of Appeal were surprisingly reluctant to follow suit. It is true that they were not convinced that the contract was not for carriage in a nominated van but that seems irrelevant. In the light of the plaintiffs' knowledge at the time of the contract, the contract was legal and could be legally performed. Even if the contract were for carriage in the van SXY 902 which could not be legally performed there is no reason of logic or convenience to entitle the defendants to take advantage of that fact, when it was not known to the plaintiffs.

But though the Court of Appeal regarded the plaintiffs' knowledge as relevant they did not appear to regard it as decisive. Pearce L.J. expressed the general principle which he regarded as governing the case as follows [10]:

> " If a contract is expressly or by necessary implication forbidden by statute or if it is *ex facie* illegal, or if both parties knew that though *ex facie* legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract; and for this purpose both parties are presumed to know the law."

It seems that Pearce L.J. intended to draw a distinction between a statutory prohibition forbidding the making of the contract and one rendering the particular performance illegal and to hold that knowledge is immaterial in the former case. This view is reinforced by the fact that in deciding whether the contract was, in fact, forbidden by statute he appealed to arguments *ab inconvenienti* all of which arose out of hypothetical situations where one party was unaware of facts which brought the contract within the prohibited class.[11]

Devlin L.J. seems at first sight to have taken a similar view. He said [12]:

> " The effect of illegality on a contract may be three-fold. If at the time of making the contract, there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it, he has to rely on his own illegal act; he may not do that even though he can show that at the time of making the

[9] See the portions of his judgment quoted by Pearce L.J. [1961] 2 W.L.R. at 173; [1961] 1 All E.R. at 420.

[10] [1961] 2 W.L.R. at 176; [1961] 1 All E.R. at 422.

[11] [1961] 2 W.L.R. at 178; [1961] 1 All E.R. at 423. Obviously different considerations arise where one party does not realise the illegality because of ignorance of the law, though even here one should not be too dogmatic. See *Kiriri Cotton Co., Ltd.* v. *Dewani* [1960] A.C. 192; [1960] 1 All E.R. 177; Webber, 23 M.L.R. 322.

[12] [1961] 2 W.L.R. at 179; [1961] 1 All E.R. at 424.

contract he had no intent to break the law and that at the time of performance, he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract *ab initio*, and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."

However, having pointed out that the present case could only fall if at all within the third class and decided that it did not,[13] he said that even if a contract for carriage of goods in an unlicensed vehicle were illegal and even if the contract here was for carriage in SXY 902, which was unlicensed, this would not of itself make the contract illegal.

> "The question is not whether the vehicle was in fact properly licensed but whether it was expressly or by implication in the contract described or warranted as properly licensed." [14]

Having already decided that the contract was not illegal, he did not feel compelled to answer this question of fact but he thought there would be much to be said in such cases for implying a warranty that the vehicle was properly licensed.[15]

Having approached the matter in this way, both Pearce and Devlin L.JJ. considered the primary question in the case to be whether a contract for the carriage of goods in an unlicensed vehicle was prohibited by the Road and Rail Traffic Act, 1933.[16] In theory this is a matter of legislative intention but as Mr. Grunfeld has pointed out [17] there is a large measure, conscious or unconscious, of judicial policy making in these situations, where the statute is silent and the prohibition is alleged to arise by implication. Accordingly both Pearce and Devlin L.JJ. answered the question not by a detailed exegesis of the words of the statute but by looking broadly at its purpose, and considering what results would flow from a finding that the contract was illegal.[18] It was held that the purpose of the statutory scheme was to promote an efficient transport system by regulating the activities of those who provided transport. Accordingly the court adopted a distinction suggested by Devlin J. in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*,[19] between a contract for the use of an unlicensed vehicle, for example, a contract of hire which was implicitly forbidden and a contract for the carriage of goods in an unlicensed vehicle, which

[13] See *infra*.
[14] [1961] 2 W.L.R. at 183; [1961] 1 All E.R. at 427.
[15] [1961] 2 W.L.R. at 183; [1961] 1 All E.R. at 427.
[16] Now replaced by the Road and Rail Traffic Act, 1960. Sellers L.J. delivered a short concurring judgment as to the facts.
[17] 20 M.L.R. 172.
[18] [1961] 2 W.L.R. at 178; [1961] 1 All E.R. at 423 (Pearce L.J.); [1961] 2 W.L.R. at 181; [1961] 1 All E.R. at 425 (Devlin L.J.).
[19] [1957] 1 Q.B. at 287; [1956] 3 All E.R. at 690.

was " collateral " and outside the ambit of the statute. This conclusion was reinforced by the fact that invalidating a contract for carriage in such circumstances would be to give an unnecessary and undeserved reward to the unlicensed carrier. It is respectfully submitted that the court showed realism and flexibility in so deciding.

M. P. Furmston.

# REVIEWS

GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE. Edited by V. GSOVSKI and K. GRZYBOWSKI. 2 Vols. [London: Stevens & Sons, Ltd. The Hague: Mouton and Co. 1959. xlvii and 1941 and (bibliography and index) 126 pp. £8 8s. net.]

THESE two volumes have been written by twenty-eight refugees from eleven countries, who received their legal education and practised law in their native countries (some of them are now members of the American legal profession). They were set the task "to present in one work a comparative study of the law and government of the Soviet Union and those of Eastern Europe within the Soviet orbit. It covers Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Rumania, the Soviet Union and Yugoslavia." The editors point out that "it seems neither possible nor worthwhile to cover in a single work all the ramifications of governmental, legal and judicial systems of eleven countries. Thus, the research was focussed not on the legal technicalities and details, but *on the effects of the legal system on the rights of the people. Elucidation of rights of the individual and their protection within the Soviet orbit was the main objective of the research* [my italics]. Topics for discussion were selected from that point of view. Individual reports followed, in so far as feasible, an organised plan and uniform coverage of essential topics and issues. Accordingly, the book is not a mere collection of essays, but represents an integrated, simultaneous effort by the several co-authors."

I quote this statement from the preface at such length because it is important for understanding the nature of this study. The authors do not provide a study in comparative law or give a systematic account of the legal system of their countries of origin, and this study cannot be used as a reference book on the present laws and procedures in those countries. In fact, it looks more like a collection of prosecutors' briefs, prepared for those who want to make a moral judgment about laws and especially about legal practice in the countries which fall within the Soviet orbit. The *leit-motiv* of all the research of the authors is the desire to prove that in these eleven countries the rights of the people do not have the protection from the legal system which they have in non-Communist countries. Only material proving this thesis is presented. Evidence which might have been presented by counsel for the defence is not called. The result is a one-sided picture. Everything in the legal system of the Soviet Union and other Communist countries is presented in the worst possible light—no positive feature is traced in these legal systems which might be favourably compared with non-Communist countries. When the provisions of the law itself cannot be condemned, distortions, infringements of law and examples of the violation of legality by arbitrary administration are presented as a general legal practice in the application of a law which is in substance not so bad. Even when the authors are confronted with new reforms, they present them condescendingly as a somewhat illegitimate child of these generally bad legal systems.

Past legal history, which reflects the special circumstances of civil war, of acute political struggle, and of emergency measures, is very often described in the historical present; and the reader is often left wondering where the history ends, and what the present situation is. Sometimes, he is helped by a footnote remark that the provisions of the law which were discussed at great

length have now been repealed, or he finds in the Appendix that the situation is now different from that described in the main text.

In the space at my disposal, I can give only a few illustrations of this method of presentation of material. The volume is opened by twelve surveys on "The Régime and the Origin" of the eleven countries (460 pages are devoted to this), which give a bird's-eye view of the origin and essential features of these régimes. There are very superficial descriptions of how power was seized by the Communists. We read (on p. 12): "Although the Bolsheviks formed an *insignificant* minority, the radicalism of their action and their promises of land and peace, though accidental to their actual programme, *brought to their side all sorts of radical elements*: Socialist revolutionaries of the Left, maximalists, anarchists, peasants cherishing the idea of the distribution among them of the landowners' land, racial separatists, local sectionalists and non-partisan personalities looking for adventure or quick enrichment" [my italics]. On p. 13 it is stated: "When the Constituent Assembly convened on January 5, 1918, it had a majority of Socialist revolutionaries and a *strong Bolshevik minority* (about *one-quarter*). It refused to recognise the Soviet government and was disbanded and dissolved by the Bolsheviks. *A handful of sailors disposed of the institution*, which had been the dream of three generations of Russian revolutionaries and of the Bolsheviks themselves" [my italics]. On p. 14 again we read: "In fact, the armed resistance to the Communist rule *of the entire population of Russia* [my italics], both the Russians and the ethnic minorities, reduced the R.S.F.S.R. to the central provinces of European Russia until the end of 1920. All the border regions were occupied by the White Russian Armies, fighting for 'Russia united and indivisible' and also by the former ethnic minorities claiming independence or autonomy." But if the Soviet government was confronted by the resistance *of the entire population of Russia*, and by the opposition of the ethnic minorities as well as by the intervention of German, French, English and Japanese armies in support of the White Russian armies (nothing is said about this intervention by the authors), how did it happen that it succeeded in re-establishing its power and regaining all its former imperial territories, except the Baltic states, Bessarabia and Poland? It is left to the reader to wonder. It is only said: "When, by *sheer military force* [my italics; from whom this force was recruited when the entire population of Russia resisted the Soviet government remains the secret of the authors: *A.B.*] the communist rule was extended to some of the lost territories some of them were included in the R.S.F.S.R. either as regular administrative subdivisions, or where a certain ethnic minority prevailed, as 'autonomous republics' or 'autonomous regions.'"

In the chapter on human rights, we read: "The Soviet state does not recognise *any restraint* [my italics] upon the government in its dealings with its citizens. The human being, as such, is not regarded as having a permanent value of his own" (p. 27). However; "The 1936 constitution contains a chapter on 'Basic Rights and Duties of Citizens,' but it is far from being a bill of rights. In the first place, *right of ownership* [my italics] is not mentioned among the rights covered therein" (p. 28). On p. 1134. "It may be concluded that the 'personal ownership' allowed Soviet citizens [by the constitution: *A.B.*] is different from normal private ownership by virtue of its limitation." On p. 1168, "At present, in theory, there exists the possibility of *unlimited accumulation of private wealth in money and securities in Soviet Russia* [my italics] if deposited in certain government banks. However, one circumstance is supposed to limit this possibility. This is the lack of legitimate and profitable avenues of activity that would facilitate such accumulation of capital, because private industrial and commercial enterprise are practically eliminated." "One thing is clear: the possibility of an unearned income for the coming generations is established under the Socialist régime of present-day Russia. Thus, in this field, as in many others, the Soviet leaders

have had to sacrifice many of their original Socialist principles in order to keep things going and to maintain the Communist Party in power" (p. 1173).

Referring to labour law, "It is clear that the 'voluntary employment' still to be found in some branches of Soviet industry, is far from our concept of free labour" (p. 1455). "The recent years of the post-Stalin era brought important liberalisation, and yet Soviet labour is still a long way from the position which it held even in the Soviet Union when the remnants of free enterprise were tolerated under the 1922 Labour Code. Only the future can answer the crucial question of how far the liberalisation can go to be compatible with total government ownership of industry and how long it will last" (p. 1458). "In discussing the general situation of post-war free employment, *Soviet Russian writers themselves plainly indicate that 'voluntary' employment under Soviet conditions is not much different from conscript labour*" [my italics] and one Soviet author is quoted who said that "In the socialist society there is no difference in principle and equality between drafted labour and labour performed by voluntarily entering into labour relations by the taking of employment. When we say that in the socialist society the principle of voluntary labour is recognised, we are not speaking of some kind of abstract principle of free labour and trade in a liberal and bourgeois sense, a principle which would be treated as a value *per se*. Under the conditions of socialist society . . . it is impossible to secure the principle 'from each according to his ability' without pressure by the state and law regarding the universal duty to work" (p. 1455).

In the chapter on administration of justice, a long, very muddled history is given, starting with revolutionary tribunals, with Cheka, the very name of which in Russian means *extraordinary* commission, with descriptions of Soviet courts before and after 1923, before and after 1938, and the history is finally brought up to 1958. A very long history is given of OGPU, NKVD, MVD and KGB [different names for the Ministries of the Interior and Security: *A.B.*] but the account which is provided of the reasons for the changes which took place in these institutions is very superficial. However, when confronted with the statement by the Chairman of the Committee of Legislative Bills of the Supreme Soviet that "In recent times, as is known, measures have been carried out directed toward the further development of democratic forms of administration of soviet justice. The Special Board attached to the MVD was abolished," the author asked "Are the statements made to visitors and the only printed statements quoted above sufficient to conclude that the punishment out of court is discontinued in the Soviet Union?" (p. 578). "It *may* be that the Special Board is truly abolished, although in a very spurious way, but that the power to impose punishment without trial and out of court did not die with the Board but still resides where it *was* designated by law, with the Ministry of the Interior, or was *tacitly* transferred to the Committee of State Security and is *perhaps not used for the time being* but *may* be revived whenever the policy of the Soviet government so requires" [my italics] (p. 579). And only from Appendix 2 of "New Acts on Federal Criminal Law and Procedure" we learn that: "If consistently carried out, this principle [criminal punishment may be applied only by a court sentence] means a complete rupture with the 40-year-old existence in the Soviet Union of penalties imposed out of court by administrative authorities (Cheka, OGPU, NKVD, MVD and KGB)" (p. 1909).

The past is similarly mixed with the present in the discussion of changes in the law as regards the death penalty (pp. 939–941, 1916).

Hundreds of similar examples of this kind of presentation of material could be given. On the surface, this study looks like scholarly research work; every quotation and statement is supported by reference to sources and a very abundant bibliography is provided, but quotations are selective. If we examine the original sources, we will find some very different aspects and different statements which would at least provide evidence of mitigating

circumstances of the "guilt" of the legal systems studied. While reading this "study," one cannot help recollecting the story of a visitor who saw a camel walking in the streets of Moscow, and exclaimed "My goodness, what have these Bolsheviks made of the horse!"

Alexander Baykov.

Gentlemen of the Law. By Michael Birks. [London: Stevens & Sons, Ltd. 1960. xi and 296 and (index) 8 pp. 25s. net.]

With the present dearth of works on the history of the English legal profession, the appearance of any book on attorneys and solicitors is bound to be awaited with interest. Expectation is heightened when the book has been as opulently, indeed as lovingly produced as *Gentlemen of the Law* has been by Messrs. Stevens and Sons to mark 150 years of publishing. The plates, well chosen and in some cases little known, deserve particular comment. The care taken with the book has been thoroughly justified by the contents; Mr. Michael Birks writes pleasantly and knowledgeably and has produced a work which will be of interest to the general reader, to whom it is addressed, and not without value to the scholar, student and lawyer as well.

Starting with a reminder that the last history of the solicitors was published sixty years ago, Mr. Birks traces the profession from its beginnings to the present day. He considers the origin of the principle of "attorneyship" and then the emergence of the professional attorney. The work which they did is next considered, first in the Middle Ages and then, with an intervening chapter on the relationship of the attorney to the scrivener, in the sixteenth and seventeenth centuries. It is regrettable that more of the story of these centuries is not told; an examination of the part played by the attorneys in the legal struggles of the early Stuart period would have been a valuable addition to this book. Mr. Birks then goes on to deal with the eighteenth-century attorney—where his work provides a valuable commentary on Dr. Robert Robson's recent book—before considering the profession in the nineteenth and twentieth centuries. The broad outline of the traditional story is unchanged but acquaintance with a wide range of modern scholarship has enabled the author to make corrections in detail; indeed this book is, albeit unintentionally, a useful synthesis of recent views on this branch of the legal profession. Of particular interest is the chapter on the development of the office of attorney in the British colonies. This chapter illustrates, too, the value of Mr. Birks' method of approaching the history of the profession through a study of the individual. Here, and throughout the book, diaries and other records are employed to give vividness to the story; the Hickey family, the worthy Joseph and his totally unworthy son, William, are especially engaging.

This method has, however, pitfalls and although Mr. Birks himself draws attention to them, they have not always been avoided. In particular, the general background has been taken at second hand and at times the story of the growth of the profession is unwarrantably precise. Occasional misrepresentation is not avoided. The account of the connection between the printing of law books and the decay of legal education in the sixteenth century is at best a hypothesis; the postulated scarcity of books before the introduction of printing contrasts oddly with the emphasis in the Year Books on "*nos livres*." Year Books were published as early as 1481, not, as Mr. Birks implies, perhaps unintentionally, in 1555 and even if most printers of law books began their trade after 1525, the same can be said of the majority of printers. Unhappy generalisation is not unknown either. The contrast between the pre-Reformation clerk rewarded with a benefice and his lay successor dependent upon fees is perhaps unfortunate. Activities represented as characteristic of the

seventeenth-century attorney can be paralleled at least a century and a half earlier. There is also a certain unevenness about the earlier part of the book. Sir William Yelverton J. is anachronistically called Mr. Justice Yelverton and Sir John Fastolf is referred to throughout as Sir John Falstaff. On p. 93, three names are given of men who were "obviously counsel" and two who were "probably Chancery clerks." In fact two of the three were serjeants-at-law and the third Attorney-General, while of the clerks one was an attorney of the Common Pleas and the other an officer of the King's Bench. Four pages earlier a note identifies two of three lawyers as serjeants but omits to mention that the other was a serjeant also.

But by far the greatest criticism of this book must be directed at the absence of footnotes. In his preface the author states that, in order to avoid producing a text overladen with references and at the same time to guide the reader to the sources, he has grouped a list of the principal authorities at the end of each chapter and has indicated in the text which of these is being used. While sympathising with Mr. Birks' difficulty, it must be said that his solution is not successful. It is impossible to check rapidly on a source, certainly not without interrupting the reading of the book. The author claims that it is not "too arduous a task" to trace a direct statement or quotation—although a bald reference to the Annual Reports of the Law Society is nearly as unhelpful as the simple direction to the Letters and Papers of Henry VIII—but general statements cannot be checked. It would, at the least, be valuable to know when the author is stating his own conclusions and where following a general authority. Furthermore, the absence of detailed references to manuscripts—made the more obvious by their sudden appearance on pp. 163–164—makes it very difficult to follow Mr. Birks into the unprinted sources he has used. This book deserved a substantial scholarly apparatus—concealed perhaps at the end of the book—and is the less useful for not having one.

But criticisms of method must not detract from the general impression that here is a book of considerable worth. For providing a first introduction to the history of the attorney, a humane companion to more arid works of scholarship, and a relaxation for members of that same profession today Mr. Birks is to be thanked.

E. W. Ives.

## Williams on Executors and Administrators. Fourteenth edition. By Professor G. W. Keeton, assisted by E. H. Scamell. [London: Stevens & Sons, Ltd. 1960. ccxliii and 1344 pp. (with index). 2 vols. £12 12s. net.]

There are some of the classics of English law which have for one reason or another been put upon a pedestal. Either the law has left them stranded, or else the clarity with which they point to principle retains its value even though details may be out of date. Those may be left alone by editors. Other extremely useful books might also be left alone; their value is as very competent collections of material, and other competent folk might as well write rivals or replacements as edit. There is though a difficult group of classics which deal with subjects of detail, yet which were written in the grand manner, or with such mastery, that they should be kept alive. To this group belongs *Williams on Executors*, written with grace of a specialised kind, a book of authority, yet one dealing with a subject-matter which both changes and relies heavily on old law. Excision is not easily made, yet unless it is freely resorted to the additions necessary to deal with modern material on a scale to match the original cannot be made without producing an unwieldy book.

The difficulty has been increasing, and the present edition goes further to meet it than some; perhaps the only other post-war edition came at a difficult time. It is clear from the Preface that the editor was very much aware of the difficulty but in general he has held his hand from a full reorganisation. There have been some changes of order, which help. Some passages such as those upon letters of administration, the valuation of annuities, or upon family provision have been substantially revised. Elsewhere the process of the incorporation of references to recent authority or recent statutes has been carefully carried out. On occasion one might wish that the incorporation were somewhat more extensive. To be specific, *Re Allen* [1953] Ch. 810 might, for example have served as the text of a short sermon, as might the *Diplock* litigation have also so served. Similarly further discussion of the past and possible uses of the Variation of Trusts Act, 1958, might have added useful guidance, since with the extended meaning of executors given in the work as a whole, that Act could assume importance for them. Again in the process of administration one might have welcomed some expansion of the law related to provisions purporting to exclude the jurisdiction of the court. These are only random examples where the modern cases are given but where one feels expanded treatment would be helpful. They are then only examples, or facets, of the general problem. That problem involves a whole range of questions. There is the choice of starting point. Thus the passages on annexation to realty, while sound, nevertheless start with law which, today, gives an air of unreality, even though the principles remain valid. Here, even an alteration of order might help. A similar feeling arises in relation to hotchpot, where one feels that the order of treatment might at least be reversed. There are, too, instances where the passage of time has made what might at one stage have been a significant statement no longer worth page-space. When the book first appeared, it probably was important to note that a natural-born British subject can acquire a foreign domicile (p. 503). While true, it is today hardly worth saying. Equally even summary treatment of the position of those married before 1883 can be too lengthy. Such ladies will be so close to being centenarians that they would be sufficiently noteworthy for anyone administering their estates to be on their guard, and thus to resort to the older books.

At other times the problem is one of translation. Some notes upon law which is still alive lose their impact because of the example given. "*Secus* as to fish in a trunk" is (to take an extreme and casual illustration) to modern generations no longer an easy guide to a distinction of value. At other times the problem of translation is more subtle. The relationship of husband and wife and of each to his, their, or her property has changed so much that old cases have to be put in a different setting if they are to have value. The heirloom may at one stage have had a special sentimental significance; granted the shape of modern death duty regulation it may have a different and more mercenary significance.

All these matters cannot be matters of criticism of an editor like the present one who expresses his awareness of the problem and within the limits which perhaps time allowed has demonstrated what can be done. They are mentioned to urge that in the next edition what he has started shall be continued, for the book still has great life, a continuation of which is ensured by his activity. One further point of his might also be emphasised. While treating of death duties the editor rightly comments that on major problems solicitors and others will turn to more specialised works. This is perhaps true of other parts too. *Williams* was already in its seventh edition when *Theobald* appeared, and other similar books have appeared since. The real value of *Williams* is to be found in the administrative portions, some of which the present editor has started to expand. In this way too this edition may point the way forward (as, incidentally, it does in appearance). As it stands it is a well-amended edition which will ensure the continued usefulness of one of

the classics, but unless the radical revision which the editor contemplates is soon undertaken, much of his labour will be in vain. That work has indicated possible ways of accomplishing successfully the larger revision.

J. D. B. Mitchell.

Comparative Law, Cases—Text—Materials. Second edition. By R. B. Schlesinger. [London: Stevens & Sons, Ltd., under the auspices of the London Institute of World Affairs. 1960. 635 pp. (with index). £4 4s. net.]

In the first edition of this work the author made clear the practical aim of his book by indicating that his primary objective was to convey to the student a sufficient familiarity with the concepts and terminology of non-common law systems to make it possible for him "really to grasp the opinion of foreign counsel and to write an understandable letter asking for such an opinion," and to enable the practitioner in litigation "intelligently to choose as well as to examine and cross-examine the experts testifying as to the foreign law." This is quite a tall order, but it may be said that Professor Schlesinger has gone far, if not further, than any other textbook writer in this field to render possible the attainment of these objectives by his thorough, clear and searching explanations coupled with many valuable illustrations drawn from foreign law sources.

The author recognises that, for practical purposes, a study of comparative law from the point of view of common lawyers really entails an attempt to understand the mental processes of lawyers in the civil law world, and for this purpose he concentrates mainly, though not exclusively, upon the law of France, Germany and Switzerland. He does, however, repeatedly bring out the important point, not always appreciated by the common law student of civil law systems, that there are, in fact, very marked differences between the various systems comprised under the general designation of civil law, differences which are in many ways even more marked than those which exist between the various jurisdictions of the common law world.

The book excludes from consideration the legal systems of Soviet Russia and other Communist countries on the ground that the legal systems of these countries should be and usually are (so far as the United States is concerned) treated in a separate specialised course. Although unfortunately, no such specialised courses yet exist in this country, the English lawyer may still feel that there is something to be said for this exclusion since, quite apart from the fact that the book is already extremely bulky and would need to be greatly enlarged to include a survey of Soviet and related legal systems, it is also probably true that the material available in English for a serious study of this field remains too meagre for treatment along the lines envisaged in a book of this kind. At the same time, perhaps a little space might have been found for reference to such an Eastern European country as Poland, which still retains a sufficient civil law element in its legal system to represent an interesting juristic approach between the Western and the Sovietic type of civil law, and it does seem that the author has rather under-estimated this factor when he asserts that the "Civil Law elements in the legal institutions of the communist countries have been reduced almost to vanishing point" (p. 197). Another, and even more regrettable omission from the pattern of the book is the absence of detailed reference to the Scandinavian legal systems, which occupy a most interesting and instructive intermediate position between the common law countries and the typical codified civil law jurisdiction. This omission seems all the more surprising in view of the author's own admission that the Scandinavian legal systems have created a model of co-operation

among sovereign states which deserves close study by those facing similar problems in other parts of the world.

The author rightly concentrates, in this work, on legal methods, sources and techniques, since the main object of comparative law must clearly be to convey the structure, form and general modes of approach adopted in other legal systems. Since however to concentrate on method is rather like presenting Hamlet without the Prince of Denmark, the author has, in a useful final section, selected three substantive topics of importance in commercial law, so that the student can be provided with material from which he can see the actual working of different legal methods and attitudes in relation to specific technical problems. The subjects chosen are: agency, companies and certain aspects of the conflicts of laws, and it is thought that this does provide a very useful supplement to the main body of the work.

One of the distinctive features of this book in its first edition was the very large portion of the text contributed by the author himself as opposed to material derived from cases, statutes, codes and periodical and other literature. This had the manifest advantage of giving the work a coherence and unity not normally possessed by a casebook on the American pattern. Indeed it can be said that this work well serves the dual purpose of providing ample material for discussion in seminars and classes, while at the same time amounting to an effective, though admittedly bulky, textbook in its own right. The main feature of the second edition is the substantial increase in the amount of text which the author has himself contributed and which it is felt has added still further to the value of the book as a whole. The author has also added a considerable amount of historical material where this is necessary to explain some of the important institutions of the civil law, and has further increased the public law element in the book which, however, still remains basically "civiliste" in character.

Lastly, it should be mentioned that the book contains a very full appendix of 100 pages consisting of classified lists of articles on comparative and foreign law in English language periodicals during the period 1929–58, which should prove of great value to the student wishing to conduct further research into particular aspects of the subject.

Dennis Lloyd.

## The Law of International Transactions and Relations; Cases and Materials. By Milton Katz and Kingman Brewster, Jr. [London: Stevens & Sons, Ltd. xliv and 863 pp. 1960. £5 10s. net.]

This is an American casebook and embodies all the attractions and all the disadvantages and dangers of a method of teaching law which substitutes the reading, discussion and analysis of cases for systematic exposition. There is, of course, very little original academic work required for the production of a book of this kind which owes its existence largely to the judicious use of scissors and similar instruments. It is a pity that outstanding American scholars, such as the authors of the present work who are distinguished professors at Harvard, feel bound to continue to devote time and energy to the publication of books which do not presuppose much research and are not even intended to contribute to the progressive development of the law. Such books are, up to a point, convenient tools for students, teachers and scholars, but they are inevitably incomplete, misleading and sometimes even inaccurate. Hence a student should be warned against any tendency to take such collections as a sufficient and reliable source of knowledge.

The present volume contains material relevant to all matters "which exist only—or primarily—because of the international factor or the factor of

'foreignness'—*i.e.*, only because more than one country is involved" (p. 3). It is therefore not confined either to public international law or the conflict of laws, but picks material also from other branches of the law which deal with foreign aspects, such as bankruptcy, taxation, procedure, restrictive practices and so forth. There is certainly much to be said for an approach which tends to eliminate frontiers that are liable to become artificial or obsolete. But while many cases are truly international in the sense that they express or illustrate an established rule of public international law, others are peculiar to the jurisdictions from which they come, and in the latter case the student should be warned against generalisation. Thus it would be wrong to infer from p. 472 that it is an internationally accepted rule that a judgment obtained in a country to which the defendant is subject merely by reason of his nationality is necessarily enforceable abroad; even in England there exists doubt (see Cheshire, *Private International Law*, 5th ed., p. 616). The three French decisions on the doctrine of "*paiement international*" (pp. 646–652) are by no means representative of international practice. They are not even the best examples which French practice supplies. And it is a mystery why the first of these cases is a decision of the Tribunal Civil de la Seine, not the important decision of the Cour de Cassation in the same case. (A similar mystery occurs on p. 231 where a decision of the English Court of Appeal rather than the House of Lords is reproduced.) Again, it is by no means certain whether the implications of the confiscation of foreign companies are adequately represented by the English and Austrian decisions at pp. 261, 799. It is also noteworthy that in very many instances the student is not given any guidance to material which discusses and, in particular, criticises decisions reproduced in this book. To print cases such as *Guaranty Trust Co.* v. *Henwood* (p. 636), *Kahler* v. *Midland Bank* (p. 684) or *Bernstein* v. *Van Heygen* (p. 816) without telling the student about the discussions which they have provoked, or the doubts which surround them, is evidence of a surprisingly conservative approach. It is another striking omission that no attention whatever has been paid to the eminently practical problem of determining the proper law of a contract.

Nevertheless this work makes a wealth of material available to the student. It comes from numerous countries and in many cases the authors have provided acceptable translations. In their comments and notes they frequently make shrewd remarks and raise important questions. In these circumstances the book is likely to prove useful.

F. A. Mann.

## Federal Jurisdiction in Australia. By Zelman Cowen. [London: Oxford University Press. 1960. xv and 212 pp. 40s. net.]

Under the Constitution of the United States the judicial power is vested in the Supreme Court and lower federal courts created by Congress; a distinct system of state courts administers state law, and the two systems have few points of contact. Some of the difficulties arising from this bifurcation of jurisdiction are well known. These difficulties are not necessarily inherent in a federal system. In Canada, India, Malaya and Nigeria, for example, the federal Supreme Courts have a wide jurisdiction (mainly appellate) in matters of regional law, the jurisdiction of regional courts includes matters of federal law, and there is no system of lower federal courts to parallel the regional courts. The founding fathers of the Australian Constitution were influenced but not dominated by American example. The High Court of Australia was vested with a fairly wide original jurisdiction by the Constitution, and also with a general appellate jurisdiction in matters of state law. There is nothing

to preclude the creation of lower federal courts, but in fact the only other federal courts created by the Commonwealth Parliament have been courts of specialised jurisdiction. Instead of having a system of lower federal courts, Australia adopted the expedient of empowering the Commonwealth Parliament to confer federal jurisdiction on state courts. This power has been extensively exercised; and the resulting constitutional and practical problems have been of excruciating complexity.

Professor Zelman Cowen is not impressed by the handiwork of the founding fathers and the Commonwealth Parliament. He would have preferred to see a more closely integrated judicial system, or if that had been unacceptable—and he is not persuaded that it was—a system more closely resembling the American. In the Australian system he sees a plethora of over-subtle distinctions serving no useful purpose and throwing no light on the fundamental characteristics of Australian federalism. But no one is better fitted than he to write an analytical critique of the body of law that has emerged, and his monograph on federal jurisdiction has all the qualities of incisiveness and lucidity that one would have expected from its authorship. English lawyers have a nodding acquaintance with the problems surrounding an *inter se* question in the context of the appeal to the Privy Council and those surrounding the definition of the judicial power of the Commonwealth exemplified by the *Boilermakers' Case* [1957] A.C. 288. Professor Cowen has little to say about either of these classes of problems; his fields of inquiry are those still more recondite areas of federal jurisprudence which are fortunately screened from the scrutiny of English lawyers. For Australian lawyers he has provided a great deal of food for thought. English readers will find in his book a confirmation of their impression that Australian constitutional law is a very tough branch of law indeed, and it will perhaps make it easier for them to form a proper appreciation of the work of the High Court of Australia. It is hardly surprising that judges nurtured on such a diet should have regularly produced weighty contributions to juristic thought and to the substance of the common law.

S. A. de Smith.

The Nuremberg Trials in International Law. By Robert K. Woetzel. [London: Stevens & Sons, Ltd. 286 pp. £2 2s. net.]

The outstanding section of this study of the Nuremberg Tribunal is undoubtedly the chapter dealing with crimes against peace. The fundamental problem Professor Woetzel grapples with is whether unobserved treaties can be a source of international law. Until 1928 international law hardly deserved such a title since it permitted war, and war is inconsistent with a true system of law. In 1928 by the Pact of Paris, the Kellogg-Briand Pact, sixty-three nations renounced war as an instrument of national policy in favour of settlement of disputes by pacific means, reserving the rights of self-defence. Was the treaty ineffective in international law since it did not lay down exact legal criteria for determination of a violation of its provisions, there being no definition of "aggression," did not specify penal sanctions, and did not provide enforcement machinery? The Tribunal decided that the absence of specific definition of aggressive war and the absence of the imposition of individual liability in express terms did not preclude the conviction of individuals for violating the Pact of Paris. The Hague Conventions did not mention penalties to be imposed on individual offenders yet individual liability for violation had long been recognised and enforced. Secondly, did the practice of states from 1928 until 1939 really justify the Tribunal in assuming that the Pact of Paris had created international law? Professor Woetzel says: "While the

Kellogg-Briand Pact may not have become part of customary international law through the continued practice of states, this would not necessarily mean that it was a treaty binding upon the signatories only, or that it had become invalid through constant violations of its provisions, according to the principle of *rebus sic stantibus* . . . the many compacts and agreements condemning the resort to war testify to an overwhelming endorsement of this concept by public opinion throughout the world" (p. 151). But he goes on to argue that in any event the justification is to be found in the confirmation of the principles of the Charter of the Tribunal and of the Judgment by the international community. And this is the theme of the book (and made plain on every page). The legal justification for the Tribunal consisted in the endorsement and approval of the international community. It is true that twenty-three nations subscribed to the principles of the Charter of the Tribunal and presented a common indictment, and that the United Nations passed a Resolution (December 11, 1946) reaffirming the principles of international law recognised by the Charter of the Tribunal and the Judgment. But can a trial become legal if the international community looks back with approval at the proceedings, whether or not the law clearly prescribed the alleged offences at the time they were committed? We can certainly prescribe the law for the next Nuremberg, but can we retrospectively validate the old Nuremberg?

The problem of definition was acute at Nuremberg. The defence relied on the maxim *nulla crimen sine lege, nulla poena sine lege praevia*, namely, an individual cannot be held criminally responsible for an act unless it has been stigmatised as a crime with a penalty affixed to it in law at the time of its commission. This principle is contained in the Universal Declaration of Human Rights, 1948, article 11. The absence of precedent and the absence of clearly formulated principles appeared to lend some force to the defence case. But relying upon the all-embracing principle of approval and endorsement by the international community to render everything legal, Professor Woetzel lamely concludes that the maxim *nulla crimen, nulla poena* "cannot be considered a limitation upon the sovereignty of a prosecuting state, but a general principle of justice. It is intended to guard against abuses of justice through retroactive legislation. But if no injustice is worked, then there is no violation of the principle" (p. 115). The problem of definition greatly exercised the International Law Commission. The U.S.S.R. "enumerative school" wanted an exhaustive list of acts amounting to the crime of aggression; the French "general definition school" thought a general formula was necessary and appropriate, and the Anglo-American school favoured "no definition" at all since an aggressor could circumvent the definition and escape liability. A detailed definition may not turn out to be exhaustive, leaving vital loopholes, no definition at all leads to the argument "no definition—no crime"; the French approach seems infinitely preferable.

The legal basis of the jurisdiction of the Tribunal is carefully examined. The territoriality principle is shown to have little validity, especially since the *Lotus* case. No positive rule of international law prohibited the Allies from assuming jurisdiction over aliens, particularly since those aliens' acts had resulted in unmistakable repercussions upon the Allies. The so-called universal principle of jurisdiction was not established in 1945. The Allies could not justify the Tribunal simply by their being the supreme executive authority in Germany by winning the war. The defences of act of state and superior orders are tellingly revealed to be worthless.

Individual responsibility for crimes against international law is justified by the literature of the law, the practice of states and the judgment of the PCIJ in the *Jurisdiction of the Courts of Danzig* case in 1928. The fact that the Tribunal's judges were all nationals of the victorious Allies is labelled a moral or political objection. "A defendant has the right to a fair trial, but not to choose his judges" (p. 45). But he has the right to insist that the

court be properly constituted and the judges be impartial, otherwise his trial is not fair.

How far have we progressed since Nuremberg? We have the Genocide Convention, 1948, the Universal Declaration of Human Rights, 1948, the revised Hague Conventions in the Geneva Convention, 1949, the European Convention and Court, 1950, the International Law Commission's formulation of the Nuremberg principles, 1950, followed by the Draft Code of Offences against the Peace and Security of Mankind in 1951. Yet in 1960, Mr. L. C. Green argued that Israel had jurisdiction to try Eichmann since neither Western Germany nor any other state had protested, because Eichmann was in fact in Israel, and because even if Israel had no jurisdiction Eichmann was not entitled to protest! (23 M.L.R. 507). Where is the international criminal court?

There are a few minor blemishes. The new French Constitution of 1946 has been replaced by an even newer one (p. 104). *Joyce* v. *D.P.P.* deserves the official reference [1946] A.C. 347, as well as the *All England* reference. Since the Homicide Act, 1957, s. 1, constructive malice has been abolished and it is no longer accurate to say that in England a participant in a robbery is *per se* implicated in a murder committed by another participant in the robbery (p. 202). But the book is attractively produced, well documented, and if a little inclined at times to be diffuse, nevertheless very readable.

H. A. S.

**Second United Nations Conference on the Law of the Sea. Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole. [Geneva: United Nations Publication. (Sales No.: 60.V.6.) 1960. xxxii and 176 pp. 17s. 6d.]**

This Conference had been called to define the breadth of the territorial sea so as to complete the work of codification of the international law of the sea begun at the First Conference held in 1958. The Conference failed, albeit by a very narrow margin, to reach the required agreement of a two-thirds majority but it did resolve unanimously that a complete verbatim record of its proceedings should be published. This somewhat paradoxical protestation of faith in the significance of abortive proceedings is explained by the present summary record. It shows that the different positions taken at the Conference were reasoned and developed at length with a view to world opinion and diplomacy more than with regard to juristic considerations. The countries which refused to accept the solution which had been proposed are clearly anxious that their reasons should not be misrepresented and the countries which supported the proposed solution must be equally concerned that their willingness to compromise should not be taken as weakening their original positions. Yet it would be wrong to imagine that these original positions could be maintained now as if the Conference had never taken place. Before the Conference there was disagreement as to the width of the territorial sea prescribed by law, now there is clearly no general rule at all. The explanation for this remarkable development will be found in the records of the Conference. These show that the difficulty of defining the territorial sea is not only due to conflicting economic interests but also due to other factors, in particular to considerations of security, which are even less amenable to compromise; they also demonstrate the unwillingness of new countries to submit to customary law developed before these countries had been admitted to the family of nations.

J. Unger.

Kerly on Trade Marks. Eighth edition. By R. G. Lloyd. [London: Sweet & Maxwell, Ltd. 1960. lxiv and 704 pp. £7 7s. net.]

The immediate impact of the new edition is of much greater clarity of exposition derived from the new system of paragraph headings adopted throughout the work. Like most legal textbooks which have gone through a number of editions, chapters have become discursive as new topics are added, but the new system enables the practitioner to find quickly the point he requires. It is a system which might well be adopted for other practitioners' textbooks.

A glance at the table of cases indicates what a large body of authority exists in relation to this branch of the law. Nevertheless, as has been shown in recent cases, the law of "passing off" is still developing. Although, as long ago as the year 1915, it was in effect settled by the judgment of Lord Parker in *Spalding* v. *Gamage*, 32 R.P.C. at p. 284, that the right protected in this class of action was not a right in a name or mark but a property in a business or goodwill, a matter which is clearly dealt with in *Kerly*, pp. 254 to 255, it is doubtful whether the consequences of this judgment have even yet been fully worked out in different branches of the law. At any rate it is remarkable how often this judgment is cited in modern cases. By fixing the attention on the principle of this judgment, it is thought that light will be thrown on a number of difficult problems, such as whether manufacturer, merchant or importer are entitled to a particular mark (*Kerly*, p. 26), who can claim to be the proprietor for the purposes of an application for registration (*Kerly*, p. 34), questions arising in connection with concurrent user (*Kerly*, pp. 165, 281 and 381) and what evidence of repute is necessary to establish a passing-off right in respect of a trade name (*Kerly*, p. 343).

Problems of concurrent user seem to be becoming increasingly prevalent, possibly due to modern developments in advertising. While this subject-matter, so far as it affects registered trade marks, is dealt with fully in *Kerly*, so far as "passing off" is concerned, there is little general discussion of the topic. Cases not infrequently arise in which two businesses with similar names, having local or specialised spheres, have been running for a considerable time concurrently and without confusion until one by increasing its sphere begins to trespass on that of the other, or into a sphere which the other contemplates entering. One example of this arises from television advertising, where a local firm may, as a result of one advertisement, become known through a much wider area than had hitherto been the case.

A somewhat different class of case arises in relation to titles of books, plays or films, or in fictional characters named therein. Cases of this description are listed in *Kerly* at p. 374, but a difficulty is sometimes to determine how far a title can be protected against use in a different medium. There is no copyright in titles or in fictional characters and these questions must be approached on the basis of protecting the goodwill of the author. But since it now so often happens that successful books or plays are adapted to other mediums, it must usually follow that the public will readily suppose, where a similar name is used, that it is such an adaptation. It seems to follow that the goodwill of the author is also so extended.

Again, in this connection, doubt may be expressed whether such a case as *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch.D. 139 (see *Kerly*, p. 344) would now be similarly decided, because new papers and similarly new films or plays are generally given extensive advanced publicity which it is thought would establish a goodwill sufficient to protect a title, even before issue or first performance.

There are one or two places in which it had been hoped that the new edition of *Kerly* would elaborate on the previous one. It would have been convenient if the chapter on rectification had summarised the grounds for rectification rather than leaving these to be gathered from other portions of

the book. Again in the chapter on registered user, the editor, while dealing with the position arising prior to the 1938 Act where a trade mark was used under licence by someone other than the proprietor, does not state precisely what is the effect since that Act if this is done without a registered user agreement. It is believed that cases frequently occur in which marks are used indiscriminately by companies within a group without any registered user agreement, and some discussion of this situation would have been welcome.

The present edition, as in the case of earlier editions, deals adequately with the kindred subjects of trade libel and trade secrets, but it is thought that the proposition at p. 458 is too general in stating that the court will restrain anyone to whom a secret has been communicated from using or disclosing it. It is thought that as regards a third party the action will only lie if such third party was aware of the contract or confidence at the time of communication. At any rate, it is thought that if such third party, having acquired the information innocently, has thereafter altered his position and spent money in developing the idea, he would not be restrained from using it. In a recent case, it was argued in the Court of Appeal that a publisher who had acquired for value a manuscript containing confidential information without being aware of the circumstances, was in a position of a purchaser for value without notice and this view seemed acceptable to the court, although in the result, it became unnecessary to determine it as the court held that the information was not confidential.

These matters, however, are only minor comments on what appears to be a very satisfactory new edition of a very valuable work, prepared by an editor of great experience in these matters.

F. E. Skone James.

**The Law of Stamp Duties (Alpe). Twenty-fifth edition. By Peter E. Whitworth, b.a., of the Middle Temple and Lincoln's Inn, Barrister-at-Law; sometime one of H.M. Inspectors of Taxes, and James Mackenzie, m.b.e., lately of the Office of the Controller of Stamps, Inland Revenue. [London: Jordan & Sons, Ltd. 1960. lxviii and 664 pp. £3 3s. net.]**

Alpe is an indispensable book of reference for all practitioners who have to deal with questions of stamp duty. Within this book may be found the statutory provisions and references to decided cases relating to almost every point which arises in this complex branch of the law. The editors appear to be somewhat reluctant to express their own views on doubtful questions, but they have spared no efforts to provide the practitioner with all relevant material so that he may draw his own conclusions. This is not a book which could be used profitably by students. They should use Monroe's excellent *Law of Stamp Duties* where the subject is dealt with in narrative form.

The text of the book under review was thoroughly revised and to some extent rearranged by the editors in the twenty-fourth edition published in 1956. In the present edition, the text has not only been brought up to date, but also the work of revision has been carried further and two substantial innovations have been introduced. The various changes in the law effected by the annual Finance Acts (in particular the Finance Act, 1958, ss. 34, 35 and 40) and other enactments have been neatly incorporated in the text. The past four years have been notable for the spate of leading cases which have been decided on the law of stamp duties (including, *inter alia*: *Grey* v. *Commrs.*, *Oughtred* v. *Commrs.*, *Independent Television Authority* v. *Commrs.*, *Western United Investment Co., Ltd.* v. *Commrs.*, *Holmleigh (Holdings) Ltd.* v. *Commrs.*, *E. C. (Holdings) Ltd.* v. *Commrs.*, *Parway Estates Ltd.* v. *Commrs.* and *Stevenston Securities Ltd.* v. *Commrs.*). The

effect of these decisions has been concisely summarised. Several of the explanatory notes have been modified or extended in order to make the same more readily intelligible. In particular, the Introduction (pp. 3 to 10 inclusive) and the section on "Conveyance or Transfer" (pp. 156 to 250 inclusive) have benefited from such treatment. This is by no means an easy book to use; it is therefore to be hoped that when preparing future editions, the editors will continue to pursue their energetic policy of recasting and extending any passages which may be obscure or difficult to understand.

The first of the two innovations concerns reliefs from full conveyance duty applicable to small transactions effected between 1910 and 1958. These reliefs, although rendered obsolete by the Finance Act, 1958, are nevertheless of great importance to conveyancers concerned with the examination of title to house property. The editors have therefore taken the step of relegating the relevant provisions with commentaries thereon to a separate appendix, thus simplifying the text of the main body of the book and facilitating reference to these obsolete reliefs. The second innovation consists of an additional appendix comprising reports of judgments in thirteen stamp duty cases, which are not to be found in either the *Law Reports* or the *All England Reports*. In fact eleven of the cases contained in this appendix are reported in *Annotated Tax Cases* and one in *Weekly Notes*; only one of the cases has not been reported in any series of reports. This new appendix will undoubtedly prove very useful to those who do not have access to *Annotated Tax Cases* and *Weekly Notes*. However, it would be of greater value if the appropriate reference to the relevant page of the appendix were given in the text of the book, whenever one of the cases reported in the appendix is mentioned. It would also be helpful if, at the end of each report, a note were added giving references to the pages in the text where the case reported is mentioned.

Two minor points arise. First, the usefulness of the table of cases could be improved if bold type were used to refer to the pages in the text where the cases listed are principally discussed. The present position is, that before finding the discussion of a case such as *Oughtred* v. *Commrs.* on p. 166, one may have to look at the nine other pages referred to in the table of cases. The second point concerns footnotes. In this book, contrary to the general rule in the case of legal textbooks, it is helpful to find case references and other notes embodied in the text, instead of contained in footnotes. The book does nevertheless contain a number of footnotes. It is appreciated that when a statutory provision is set out verbatim, the best way of referring to any definitions of the terms used or to amendments, is to employ footnotes. However, several footnotes in this book contain matter which could well be embodied in the text (*e.g.*, the footnotes on pp. 165 and 349).

It remains to mention that although the present edition is 139 pages longer than the last edition, the price has been increased by only eight shillings.

John Cherryman.

## Guenther Podola. Crime Documentary No. 1. By Rupert Furneaux. [London: Stevens & Sons, Ltd. 1960. xi and 319 pp. (including Appendices). 18s. 6d. net.]

To the layman, this book must surely appeal as a fascinating account of one of the most perplexing criminal cases in recent legal history in England. It was not easy to form a final judgment from the newspaper reports on the vexed question whether Podola was feigning amnesia, and the law report was naturally confined to the legal issues. Indeed, even among legal writers, few persons ventured an opinion in print. Now that we have an opportunity to read the medical evidence in full, it will be interesting to see what the final judgment is.

But to the lawyer there is yet another fascinating interest in the case. Would the jury's decision have been the same had they been differently directed on the burden of proof? Mr. Justice Edmund Davies told them that it was for the defence to prove the hysterical amnesia on a balance of probabilities. Can we be sure that their decision would have been the same if they had been told they must be sure beyond reasonable doubt that Podola was feigning? This reviewer, after a careful reading of the evidence, has reached the conclusion that Podola was probably feigning—in other words, I would agree with the jury's verdict given the direction they were given—but I cannot agree that it was beyond reasonable doubt. If it is said that it was not open to the court to leave it to the jury in this way, and that already the onus of proof in cases of insanity and diminished responsibility is accepted as resting on the defence on the basis of a balance of probabilities, and that this case was similar to insanity and must therefore be dealt with on that basis, my reply would be that it was only by raising the preliminary issue under the Criminal Lunatics Act, 1800, that the case of Podola got caught up with the question of insanity at all, and that it was perhaps unfortunate that this occurred, because there was an alternative course available to Podola, namely, to remain mute on arraignment and to argue that he could not plead because he did not remember the circumstances surrounding the crime and could not know whether he was guilty or not guilty. The Criminal Lunatics Act, 1800, did not affect the common law right to raise a preliminary issue on arraignment in this way, and here the case of *Sharpe*, which Edmund Davies J. declined to follow, points strongly in the direction that the Crown should satisfy the jury beyond reasonable doubt that the accused is mute of malice and not by the visitation of God. If the case had gone to the jury on that basis, it seems possible, indeed likely, that they would have found for the defence. But it seems probable that it would have been a barren victory, for Edmund Davies J. would no doubt have ruled that hysterical amnesia did not disable the accused from being fit to stand his trial, following *Russell* and *Prichard*, as did the Court of Criminal Appeal. Even here, however, it is possible to argue that the decision is wrong, as the person who cannot remember the events surrounding the crime is in a very great difficulty in instructing his counsel what defences to raise. The fact that the Court of Criminal Appeal accepted the view expressed in the Scottish case of *Russell* that in the presence of a plea of amnesia the judge should point out to the jury that they should be specially careful to satisfy themselves that the accused was proved guilty seems to underline the doubts which have been expressed above about the way in which the burden of proof was expressed.

Although Podola has secured for himself a place in the annals of legal history, there can be no repetition of the case in future, for we now know as a matter of law that hysterical amnesia is not available as a ground of unfitness to plead. The decision of the Attorney-General not to allow his fiat for the matter to be tested in the House of Lords was regrettable and means that we must be content with the Court of Criminal Appeal's decision. But there is no need to rest content with the way in which the burden of proof was stated. The proliferation of instances in criminal law where the onus of proof is held to be on the defence, and the burden is to establish some matter on balance of probabilities, should be resisted by anyone anxious to preserve the full effect of *Woolmington's* case. Insanity was there recognised as an exception, but it is an anomaly, and, as Lord Justice Devlin explained some years ago, it is perhaps only understandable in terms of the presumption of intent and the presumption of sanity which had to be made at common law at a time when the evidence of the prisoner on oath was not available to the court. Such an historical anomaly may have to be endured, and it was natural to treat diminished responsibility in the same way, but there is no need to add to the exceptions and thus weaken the protection afforded by *Woolmington*. The recent example of the summing-up by Byrne J. in the *Lady Chatterley's Lover*

case, provided further evidence of a trend which, it is submitted, should be scrutinised with care and not be uncritically accepted. For here again, on the issue of the special defence of publication for the public good, the judge directed the jury that they must be satisfied on a balance of probabilities. How many more exceptions are there of this nature?

When the matter is viewed against the broad backcloth of the general defences to crime, surely all those situations are cases in which the defence have to prove some state of affairs, such as mistake, compulsion, consent, but it has never been suggested that the defence must prove these facts on a balance of probabilities. It is sufficient if when all the evidence is in the jury are left in reasonable doubt. This in my view should have been the position in the *Lady Chatterley's Lover* case. The fact that the jury found for the defence in any case should not obscure the danger that juries in future in dealing with other books will find it difficult to be satisfied on a balance of probabilities. But they might well have reasonable doubts. Let us extricate ourselves from this evidentiary mess before it is too late!

To get back to this book by Mr. Furneaux, one must say that it is an extremely valuable publication. Not only does it contain a readable account of the trial itself, but, in an epilogue, Mr. Furneaux attempts some interpretation, showing how difficult it might be in practice if the criminal law did recognise amnesia as a ground of unfitness to plead, by speculating what might have happened in other famous criminal trials, such as Seddon, Rouse and even perhaps Christie. There is an appendix giving details of the number of policemen murdered in England and Wales since 1900, and another giving a fairly full version of the Scottish case of *Russell*, which was followed in the Court of Criminal Appeal. The last chapter also contains some highly interesting if rather sketchy details of Podola's boyhood and his wartime and post-war experiences. The only complaint I have is that Chapter 16, in which the legal issues of fitness to plead and hysterical amnesia are discussed, is rather confusing, as Mr. Furneaux incorporates in an account of the arguments at the trial some passages from the appeal court proceedings, which are introduced within square brackets. This makes it extremely difficult to follow the discussion. Apart from this blemish, the book can be highly commended, and is well worth reading.

J. E. Hall Williams.

The French Penal Code. The American Series of Foreign Penal Codes, I. Editor-in-Chief Gerhard O. W. Mueller, J.D., LL.M., Associate Professor of Law, New York University. Translators: the Editor-in-Chief and Jean F. Moreau, Research Professor of Law, New York University. Introduction by Marc Ancel, Justice of the French Supreme Court, Director of the Criminal Law Section, Institute of Comparative Law, Paris. [Fred B. Rothman & Co., South Hackensack, N.J.; London: Sweet & Maxwell, Ltd. 1960. xviii and 158 pp. 30s. net.]

The Korean Criminal Code. The American Series of Foreign Penal Codes, II. Translator: Paul Ryu, Professor of Law and Academic Dean, Seoul National University. [x and 145 pp. 30s. net.]

These two volumes are the first fruits of the Comparative Criminal Law Project of the New York University School of Law. In his foreword to the first volume the Editor-in-Chief explains that law comparison—the principal

tool of the law reformer abroad—has been put to little use on any of the American reform projects, very much to the detriment of enlightened and effective improvement. The series is intended to make the necessary information available. But both "criminalists" and "comparatists" in Great Britain also will find use for these admirable volumes. The textual introductions to the translations, while covering matters of interest on the history, ideology, form and structure of the code, are not meant to be commentaries. The task of annotating, or theorising about, the codes is not within the purview of this particular series. The thirteen-page Introduction to the French Penal Code is described by the editor-in-chief as a "scholarly masterpiece." After making the necessary mental translation of the language of praise the English reader may accept this estimate. It is good. The longer Introduction to the Korean Criminal Code of 1953 shows how the legislator attempted to find solutions which would best embody both the doctrinal refinement of traditional German criminal law and the libertarian emphases which have marked American criminal law.

W. H. D. Winder.

The Law of Sewers and Drains. Second edition. By J. F. Garner. [London: Shaw and Sons, Ltd. 1960. xxxix and 186 pp. 30s. net.]

This is the second edition of Mr. Garner's excellent book on *The Law of Sewers and Drains*. It is a fine piece of elucidation of a remarkably obscure subject. One wonders whilst reading it whether any country other than England would have allowed, in such a matter as this, the complexities for the lawyer to rival those of the engineer. Sewers and drains have a limited life: because everyone uses them, everyone is liable to have a minor engineering or a minor legal problem at some time in his life. So far as the legal problems are concerned, one would expect to be able to turn to the provisions of the Public Health Act, 1936, for a complete answer, but this cannot be done. In many cases, as Mr. Garner so carefully explains, one has to go back to the old law of the 1875 Act, with its many vaguenesses, to try to find an answer.

One answer that will not be found either in the 1875 Act itself or in Mr. Garner's book is the meaning of that ridiculous phrase "a sewer laid by any person for his own profit." Its meaning is important and, as Mr. Garner says, has been tested in the courts many times, but no precise meaning has been or can be found for the phrase and it is stupid to continue to determine by such a criterion whether a pre-1937 sewer vests in the local authority.

On the main subject-matter of the work there is not much hope of improvement of the law, but on a subsidiary subject dealt with in the book, that of pollution of rivers and streams, improvements in the law have already had a practical effect. Both the statute and case law is serving to help to restore our rivers to their former glory. The importance of this subject grows as litigation and threats of litigation, inspired by the success of others, become more regular. Mr. Garner's chapter on the discharge of sewage effluents contains an excellent summary of the present position. It is a chapter which will, no doubt, be enlarged in future editions, as will the somewhat associated chapter on the drainage of trade premises, where again improvements to the law are to be expected.

To the specialist in this field Mr. Garner's book by itself is not enough. The appropriate volume of Lumley's *Public Health* with its mass of references remains essential. But to anyone concerned to obtain a quick answer to an unfamiliar problem the logical arrangement of this book commends its use. It makes clear what is capable of being made clear and points out the obscurities. For this alone it is well worth having on the shelf.

H. B. Sales.

Derating and Rating Appeals. Volume 30. Edited by F. A. Amies, b.a., etc., Barrister-at-Law. [London: Solicitors' Law Stationery Society, Ltd. 1959. 982 pp. 90s. net.]

This latest volume of reports of cases in the superior courts and in the Lands Tribunal retains the high standard and characteristics of its predecessors. It is perhaps some ground for satisfaction that the annual volume may be somewhat slimmer in subsequent years if derating of industrial hereditaments is eventually abolished as a consequence of proposals now before Parliament; there may also be less litigation on charities in future (some 14 cases in the present volume).

J. F. G.

Latin for Lawyers. Third edition. [London: Sweet & Maxwell, Ltd. 1960. viii and 287 pp. 21s. net.]

This is in some ways a useful book, and Parts II and III (Latin Maxims and Phrases, and General Vocabulary) will be of considerable benefit. It is unlikely, however, that students in this country will derive much help from Part I, which contains a short course on Grammar and Syntax. In his attempt to make students familiar with "the fundamental principles of the language," the author, Mr. E. Hilton Jackson, fails to achieve the simplicity that is essential in a handbook of instruction of this kind. Some of the Rules of Syntax are framed in terms that would be too abstruse for any student who had not been already well grounded in the syntactical principles of his own language. The method adopted for giving references to the Rules of Syntax during the course of the lessons is unnecessarily complicated; it would have been better if the relevant rules had been given at the start of the lessons in which their acquaintance was first made. It would also have helped if some of the examples had been translated.

There are a number of misprints: p. 9, *stipulat rem* for *stipulatorem*; p. 46, *laedi* for *laesi*; p. 48, *samo* for *sumo*; p. 77, *-er* for *-re*; p. 93, *estute* for *estote*.

T. A. Dorey.

## *Books and Publications Received*

Review. Published by the Study Centre for Jugoslav Affairs. Vol. No. 1. 1960. 71 pp. 62 Offley Road, London, S.W.9. 9s.

Green's Death Duties. Third (Cumulative) Supplement to the 4th edition. By D. J. Lawday, ll.b., and E. J. Mann, ll.b. 1960. xii and 92 pp. Butterworths. 10s. 6d.

Medicine, Science and the Law. Official Journal of the British Academy of Forensic Sciences. Editor: Francis E. Camps. Vol. I, October 1960. 132 pp. Sweet & Maxwell, Ltd. £3 3s. 0d. p.a., 17s. 6d. per part.

International Political Science Abstracts. Vol. X. Nos. 2 and 3. 1960. Basil Blackwell, Oxford. 12s. each.

Hanson's Death Duties. 10th edition. Fifth Cumulative Supplement (to December 31, 1960). By Henry E. Smith, ll.b. assisted by D. H. Fletcher, ll.b. xii and 185 pp. Sweet & Maxwell, Ltd. 25s.

The Mental Health Act, 1959. By S. R. Speller, o.b.e., ll.b. xiii and 138 pp. The Institute of Hospital Administrators, 75 Portland Place, London, W.1. 13s. 6d.

Air Manual (Civil and Criminal) 2nd Ed. Vol. 9. Kazis Act, 1880 to Limitation Act, 1908. 1044 pp. The All India Reporter Ltd. Nagpur. 1961.

Legal Decisions Affecting Bankers. Vol. 6, 1947–1954. Edited and annotated by Maurice Megrah. x and 484 pp. Blades, East & Blades Ltd. 17 Abchurch Lane, London, E.C. 1960. 20s.

Annual Survey of South African Law, 1959. xxxi and 348 pp. Published for the Faculty of Law of the University of the Witwatersrand. By Juta & Co. Ltd. 1960. Distributed by Sweet & Maxwell, Ltd. 48s. 6d.

A Jogszabályok Értelmezése. Szabó Imre. With Summaries in Russian and French (L'Interpretation des Normes Juridiques). 618 pp. Közgazdasági és Jogi Könyv Kiarto. Budapest. 1960.

The A.I.R. Manual, 2nd edition, Vols. 7 and 8. The All India Reporter Ltd. Nagpur. 1960.

The International Status of the German Democratic Republic. By Roger Pinto. Reprint (in French and English) of an article in "*Journal du Droit International*," No. 2. Paris. 1959.

Encyclopedia of the Law of Compulsory Purchase and Compensation. Release No. 3, November 21, 1960. Release No. 2, July 28, 1960. Encyclopedia of the Law of Town and Country Planning. Release No. 4, October 19, 1960. Release No. 3, October 10, 1960. Release No. 5, January 31, 1961.

Civil Liberties Docket. Vol. V, No. 3 and No. 4. Vol. VI, No. 1. 2019 Vine Street, Berkeley 9, California.

Bulletin of the International Commission of Jurists. No. 11. December 1960. 60 pp.

Manual of Legal Citations. Part II, The British Commonwealth. xiii and 89 pp. Institute of Advanced Legal Studies. 1960.

Legislation of Poland: Copyright Law. Vol. 5. 155 pp. Polish Institute of International Affairs. Warsaw. 1959.

Revue de Droit Hongrois. Vol. 2. 1960. Code Civil de la Republique Populaire Hongroise. Traduit par Pal Sebestyen. 192 pp. Corvina, Budapest.

The Common Law. By S. K. Das. 28 pp. Malayan Law Journal Ltd. Singapore. 1960. 5s. 10d.

The Progress of International Law. An Inaugural Lecture. By R. Y. Jennings. 1960. 49 pp. Cambridge University Press. 3s. 6d.

The 1960 Income Tax Legislation in the Federation of Rhodesia and Nyasaland. By A. S. Silke. 44 pp. Juta & Co. Ltd. Distributed by Sweet & Maxwell, Ltd. 21s.

Where to Look for your Law. 13th edition. By C. W. Ringrose. 1960. 228 pp. Sweet & Maxwell, Ltd. 10s. 6d.

Antiquity of Hindu Jurisprudence. By Sukumar Dutt. 1961. 17 pp. Universal Law House Allahabad (India). 4s. 6d.

Dean's List of Recommended Reading for Prelaw and Law Students. Selected by the Deans and Faculties of American Law Schools. Compiled and edited with annotations by Julius J. Marke. 1958. 178 pp. Oceana Publications. 30s.

Verrykingsaaspreekliheid in die Suid-Afrikaanse Reg. Deur Wouter De Vos. 1958. xiii and 233 pp. Juta en Kie, Beperk. 57s. 6d.

Elliott's Legal Forms. Formerly Juta's Legal Forms. In English and Afrikaans. Fourth and enlarged edition by R. C. Elliott. 1959. xiii and 295 pp. Juta & Co., Ltd. Stocked and distributed by Sweet & Maxwell, Ltd. 88s.

Large and Loving Privileges. The Capitulations in the Middle East and North Africa. David Murray Foundation Lecture in the University of Glasgow. By Sir Reader Bullard. 1960. 39 pp. Jackson, Son & Co., Glasgow. 6s.

# CORRESPONDENCE

THE EDITOR,

*The Modern Law Review.*

Sir,

May I comment on Professor Kahn-Freund's letter in your September 1960 issue [1] in which he deals with a marginal point raised in my paper in your May 1960 issue [2]?

Professor Kahn-Freund has imputed to me a view which I do not hold. I made it clear in the passage concerned that I repudiated the fiction of Intimidation in cases in which the resignation of the judge would have obviated a threat to life or limb. Professor Kahn-Freund has understood this correctly. I then mentioned that "*in the final event*, however," the legal policy (of admitting the fictitious defence of intimidation) "*appears* to be *materially* justifiable" on the ground that the factual event or outcome was a foregone conclusion which was not affected by the intervening judgment. The qualifying words (which I have put in italics) are of course relevant. I did not say that the policy in question was justified as I had just made it clear that I did not think that it was. While repudiating it I wished to explain its rationale as one of expediency rather than of principle.

Obviously I must have expressed myself clumsily. But Professor Kahn-Freund should not have substituted a word of his own choice, namely "nevertheless" for my "in the final event, however." This distorts the meaning of my statement, giving it a complexion which is alien to the general purport of my paper.

For the record, I may mention that the clause in question was clause 52 (not 54 as Professor Kahn-Freund states). I regret the oversight which made it appear as clause 53; but then, I had quoted both the title and the wording of clause 52.

H. O. PAPPE.

*Research School of Social Sciences,*
*Australian National University,*
*Canberra.*

[1] 23 M.L.R. 603.
[2] 23 M.L.R. 260.